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No. 82-5298

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ANDRES SEGURA and LUZ MARINA COLON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered November 6, 1981, and June 29, 1982.

CITATIONS TO OPINION BELOW

The decision of the District Court, dated May 15, 1981, is found in Appendix A hereto. The interlocutory decision of the Court of Appeals, dated November 6, 1981, and reported at 663 F.2d 411 (2nd Cir. 1981) is found in Appendix B hereto. The decision of the Court of Appeals affirming the convictions is found in Appendix C hereto.

JURISDICTION

The Court of Appeals judgment reversing, in part, the District Court's suppression of evidence, was entered November 6, 1981. The Court of Appeals judgment affirming the convictions was entered June 29, 1982. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the introduction into evidence of contraband seized after a 19-hour hiatus between the illegal entry into

and seizure of petitioners' dwelling and the obtaining of a search warrant violates the Constitutional requirement that a magistrate find probable cause and issue a warrant before the police violate the privacy of the home?

2. Whether the government's affidavit in support of the warrant to search petitioners' dwelling contained material misrepresentations without which there was no probable cause for the issuance of the warrant?

PROVISIONS INVOLVED

1. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." United States Constitution, Amend. IV.

2. "No person shall . . . be deprived of life, liberty, or property, without due process of law." United States Constitution, Amend. V.

STATEMENT

In January, 1981, members of the New York Drug Enforcement Task Force received information that certain persons were dealing in cocaine from an apartment located at 12-10 Astoria Park South, Queens, New York. Undertaking physical surveillance of the building, the agents ascertained that the occupants of the apartment were petitioners Segura and Colon. On February 7, 1981, petitioners were observed moving into a new apartment located at 37-07 147th Street, Apartment 3-D, Queens, New York. The 147th Street apartment was located on the third floor of a high-rise building, in the rear of the building. It is this apartment which the agents entered on February 12, 1981.

Between January 26, 1981, and February 12, 1981, petitioners were kept under surveillance by the government agents. Although the petitioners were seen together at times, and lived together in the same apartment, most of the surveillance was dir-

ected toward petitioner Segura, who was seen on many occasions outside the presence of petitioner Colon.

On January 26, 1981, Segura was seen operating a red Datsun station wagon. On January 29, 1981, Segura was seen acting "suspiciously" in meeting with a person outside his apartment building. On February 8, 1981, Segura was seen meeting with a "known drug violater" and driving to Brooklyn with him. On February 9, 1981, Segura was seen driving his car to a motel in Queens and meeting with Enrique Rivudalla-Vidal. On all of the above-mentioned occasions petitioner Segura was seen either alone or with persons other than Colon.

On February 12, 1981, the agents trailed Segura and Colon from their 147th Street apartment to the Burger King restaurant located at 222nd Street and Northern Boulevard in Queens, and observed them enter the establishment. Not long afterwards, Rivudalla and Esther Parra drove into the Burger King parking lot and parked near Segura's car. Rivudalla entered the Berger King and sat down at a table with Segura. Colon was seated nearby. Shortly thereafter, Colon left the restaurant carrying a large shoulder bag. The bag appeared to the agents to be bulging in the middle. Colon then entered the car in which sat Esther Parra, and exited it shortly thereafter, "zippering-up" the shoulder bag, which the agents observed to be noticeably smaller in bulk then when she was observed entering the car.

As a result of this suspicious activity, the agents dropped their survellance of Segura and Colon, and instead followed Rivudalla and Parra to a residential area of Jackson Heights, Queens. As Rivudalla and Parra exited their vehicle, the agents conducted a Terry stop of them and subsequently discovered one-half of a kilogram of cocaine in a paper bag that was being carried by Parra. Rivudalla and Parra were immediately arrested and taken to DEA headquarters in Manhattan for processing. The arrest of Rivudalla took place at approximately 5 p.m. on February 12, 1981.

At about 6 p.m., Rivudalla told the agents that he had received the cocaine on consignment from Segura earlier that day

at the Burger King. Originally, Rivudalla was to receive one kilogram of cocaine from Segura, but that plan was reduced to a half of kilogram because Rivudalla was not sure that he could dispose of an entire kilogram. Finally, Rivudalla told the agents that Segura was to telephone him at approximately 10 p.m. that day (February 12) to discuss Rivudalla's success in disposing of the consigned cocaine.*

Agent Palombo telephone the United States Attorney's Office, Eastern District of New York, at 6:30 p.m., and requested authority to arrest Segura and Colon and to search their apartment. Assistant United States Attorney Thomas Roth told the agent that a search warrant could not be obtained until the following morning because the Magistrate had gone home. Mr. Roth instructed the agent to attempt to arrest Segura and Colon, and to go to their apartment building and "to secure the premises outside the premises."

At 7:30 p.m. on February 12, Agent Shea and two other officers went to petitioners' apartment house and gained entry into the building by walking in behind a tenant who unlocked the lobby door. At the time of their arrival, the "best information" that the agents had was that the petitioners were not at home. The agents were directly to Apartment 3-D on the third floor. Agent Shea put his ear to the door, and heard no conversations or other noises. It appeared that there were no lights on in the apartment.

From 7:30 p.m. until 10:00 or 10:30 p.m., the agents hid in the fire stairs on the thid floor where they were able to observe petitioners' apartment and also observe anyone enter or exit from the apartment. After about three hours, the agents decided to vacate the fire stairs and go outside to the front of the building to wait for the petitioners to arrive.

At about 11:15 p.m., the agents observed Segura walk to the apartment building. Segura entered the locked vestibule of

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*Because Rivudalla was unavailable at the time of the trial, the conversation between Rivudalla and the agents was not disclosed to the jury.

the building with a key. The officers followed him inside the vestibule and placed him under arrest. Agent Shea searched him, handcuffed him and told him, "Let's go up to the aparment". Segura denied living in the building, but was forced to go up to the third floor with the agents. In the corridor on the third floor, Segura attempted to stop, so Agent Shea had to shove him.

Agent Shea, with his gun drawn but hidden behind his leg, knocked on the door of Apartment 3-D. The door was answered by Luz Marina Colon, who, when she opened the door, was face to face with the three officers and Segura. The agents walked into the apartment without seeking permission, and told Colon that Segura had been arrested and that the agents were "in the process" of obtaining a search warrant for the apartment.

Present in the apartment, besides Colon, were three other persons, all of whom were subsequently arrested and all of whom were subsequently dismissed at the request of the United States Attorney's Office. Immediately upon entering the apartment, two officers went into all the rooms of the apartment, and looked into all of the closets, ostensibly to make sure that no other persons were there. In the course of this "walk-through", the officers saw several jars of lactose and a scale atop a table in the master bedroom. In a closet in the master bedroom, the officers observed several plastic "baggies" of the sort used to keep leftover food.

Within five minutes of the three agents entering the apartment, Agent Palombo arrived and arrested Luz Marina Colon and the three other persons who were there. As the agents prepared to take away the five prisoners, Colon asked for her shoulder bag, which was on a table in the living room. An agent picked up the bag, and upon looking inside, discovered a loaded revolver and two thousand dollars.

Before being taken away, Segura said to the agents: "The stuff in here is mine."

At least two officers remained in the apartment all night "to secure the place".

The next day, February 13, 1981, a two-page search warrant affidavit was prepared by Agent Palombo. The affidavit contained five paragraphs, which may be summarized as follows:

1. At 5:25 p.m. on February 12, 1981, Rivudalla and Parra were arrested in possession of one pound of cocaine.

2. Rivudalla informed agents that he had received the cocaine from Segura at the Burger King restaurant earlier that day.

3. The agents had seen Rivudalla and Segura meet at the Burger King.

4. Segura told Rivudalla that he (Segura) "had an additional quantity of cocaine at his home".

5. At 11:15 p.m., "agents observed SEGURA approach the apartment 3D at the location and attempt to enter. At that time SEGURA was placed under arrest. Following his arrest SEGURA admitted that he kept additional quantities of narcotics in the apartment."

At the suppression hearing, Agent Palombo testified that Rivudalla never made the statement attributed to him in paragraph four, but was an inference drawn by Palombo from Rivudalla's telling him that the original plan had been for Segura to supply Rivudalla with a full kilogram of cocaine.

Agent Palombo further testified that the allegation in paragraph five that Segura "admitted that he kept additional quantities of narcotics in the apartment" was an inference drawn by Segura's statement, while in the apartment in custody of the agents, that "The stuff in here is mine".

The affidavit in support of the search warrant contained no mention whatsoever of petitioner Luz Marina Colon, and no mention of the agents' entry into the apartment the night before, nor of their findings while in the apartment.

The search warrant was approved by a magistrate at approximately 6:00 p.m. on February 13, 1981. After being told over the phone at the impounded apartment that the warrant was signed, Agent Shea supervised its execution at Apartment 3-D.

In the master bedroom, Agent Shea opened an attache case

and found two packages of cocaine totaling twelve hundred fifty (1250) grams, and approximately thirty-nine hundred ($3,900) dollars. The agent searched a coat in the bedroom closet and found in the pocket fifty-eight (58) grams of cocaine and, on a closet shelf, records of purported narcotics transactions. In a search of the second bedroom, the agents found cash in a dresser drawer, eighteen rounds of .38 caliber ammunition in a woman's eyeglass case, and approximately fifty thousand ($50,000) dollars in a box. The above-named items, as well as the scale, lactose, and baggies found by the agents the night before, were removed from the apartment by the agents.

After hearing the testimony of Special Agents Palombo and Shea, Assistant United States Attorney Roth, and defendant Rivadulla, the District Court granted petitioners' motion to suppress in its entirety (Appendix A). The District Court rested its decision on two grounds. First, it found that the initial warrantless entry could not be justified on the basis of any exceptions to the warrant requirement (Appendix A, 12-18). Second, the illegality of the initial entry and arrest of Colon, coupled with the unreasonableness of the delay in securing a search warrant, required the suppression of the evidence seized from petitioners' dwelling. "To validate the search of the apartment under the circumstances of this case would permit Government agents to take advantage of their own wrong." (Appendix A, 22).

On appeal by the government to the Court of Appeals, the District Court's order was affirmed in part and reversed in part. The Court of Appeals held that the entry by the agents into petitioners' dwelling was not justified, and that all items discovered prior to the issuance of the search warrant must be suppressed. However, the evidence discovered pursuant to the search warrant should not have been suppressed, and may be introduced into evidence at petitioners' trial. United States v. Segura, 663 F.2d 411 (2nd Cir. 1981) (Appendix B).

The petitioners' then proceeded to trial in the District Court and were convicted of narcotics offenses.

The Court of Appeals affirmed the convictions, rejecting the contentions of the petitioners that the search warrant was invalid because it was procured on the basis of material misrepresentations and that the convictions were based on insufficient evidence (Appendix C).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Second Circuit upholding the introduction into evidence of contraband seized from a dwelling many hours before a warrant is obtained (App. B) is in direct conflict with the following Court of Appeals and State Court cases: United States v. Griffin, 502 F.2d 959 (6th Cir. 1974), cert. denied, 419 U.S. 1050 (1974); United States v. Allard, 634 F.2d 1182 (9th Cir. 1980); State v. Bean, 572 P.2d 1102 (Wash. 1978); People v. Shuey, 120 Cal. Rptr 83, 533 P.2d 211 (1975); and State v. Dorson, 615 P.2d 740 (Haw. 1980).

Furthermore, the material misrepresentations contained in the affidavit for the search warrant pose additional Constitutional questions dealing with the Warrant Clause of the Fourth Amendment.

In the instant case, after illegally entering and impounding petitioners' apartment at 11 p.m. on February 12, 1981, the officers arrested all of the occupants and stationed several officers inside the apartment to wait for the expected issuance of a search warrant. The search warrant was granted by a magistrate at 6 p.m. on February 13, 1981, approximately nineteen (19) hours after the seizure of the apartment, and approximately twenty-four (24) hours after the police initially made inquiries about obtaining a warrant.

The District Court concluded "that there was sufficient information contained in the affidavit independent of any information that the agents gathered at the time of the illegal entry to justify the issuance of the warrant by the magistrate. In other words, the warrant was valid." (App. A, 18-19). The Court

of Appeals likewise found the warrant to be valid.

The respondent may argue that because the warrant was "valid", the initial illegality of the agents should be excused and the evidence should be admissible. To accept the argument would be to nullify the protections of the Warrant Clause of the Fourth Amendment in that it would allow the police to illegaly enter a dwelling any time they later planned to seek a search warrant. The question of probable cause would be left at the discretion of the police rather than in the hands of an impartial magistrate.

The test for whether to suppress evidence seized pursuant to a warrant executed after an unlawful entry is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Wong Sun v. United States, 371 U.S. 471, 468 (1963).

The Court of Appeals for the Second Circuit in discussing the exclusionary rule, has stated that there are three possible exceptions to the rule: independent source, inevitable discovery, and the doctrine of attenuation. Each exception rests on the lack of a sufficiently close connection between the state's wrongdoing and the invasion of the defendant's reasonable expectation of privacy. "In each case, we must weight the extent of any illegality, the probative value of any legally obtained information, and the relationship between the two, always with the hope of vigorously enforcing the Fourth Amendment without imposing ineffective constraints on criminal investigations." United States v. Alvarez-Porras, 643 F.2d 54, 60 (2nd Cir. 1981).

Weighing the extent of the illegality, and the close connection between the wrongdoing and the invasion of petitioners' privacy, it is petitioners' position that the "execution" of the warrant in the instant case was not sufficiently distinquishable from the illegality of the initial entry and impoundment of the apartment to be "purged of the primary taint". Wong Sun v. United

States, supra at 488.

In weighing the extent of the police illegality, it must be kept in mind that "the Fourth Amendment is designed to prevent, not simply to redress, unlawful police action." Chimel v. California, 395 U.S. 752, 766 n. 12 (1969). It is respectfully submitted that the Court must fashion an opinion which would prevent, in the future, the kind of police activity that was present in the instant case. "If suppression motions and damage actions were sufficient to implement the Fourth Amendment's prohibition against unreasonable searches and seizures, there would be no need for the constitutional requirement that in the absence of exigent circumstances a warrant must be obtained for a home arrest or a search of a home for objects." Steagald v. United States, 101 S.Ct. 1642, 1649 (1981). The only way to stop this kind of illegal police activity is to, in effect, punish the police for their misconduct.

In terms of the reasonable expectation of privacy of the petitioners, there can be no more of such expectation than in one's home, at nighttime. "It is clear that one's reasonable expectation of privacy in the home is entitled to a unique sensitivity from federal courts." United States v. Reed, 572 F.2d 412, 422 (2nd Cir. 1978), cert. den., 439 U.S. 913 (1978). See also: Cardwell v. Lewis, 417 U.S. 583 (1974).

The extent of the illegality here is further evidenced by the intrusiveness of the police. For the agents to impound petitioners' apartment for nineteen hours awaiting a search warrant that had not even been applied for at the time of the initial entry is unconscionable, particularly in view of the fact that a warrant may be obtained quickly, and may even be done by telephone. Federal Rules of Criminal Procedure, Rule 41(c)(2). The agents "moved in" to the apartment and did not leave until they had achieved their illegal purpose. United States v. Agapito, 620 F.2d 324 (2nd Cir.) cert.den., 449 U.S. 834 (1980).

United States v. Griffin, supra., deals with a fact pattern almost indistinguishable from the facts here. In Griffin, supra., the police had probable cause to search a dwelling, and

when no one answered, they went in, waited four hours for the arrival of the warrant, and then searched the premises. The Court upheld the suppression of the evidence seized from the premises, on the ground that "any other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment." Griffin, supra., at 961.

The Court of Appeals for the Second Circuit just recently discussed Griffin approvingly: "In Griffin, the purposes of the exclusionary rule were served by suppressing the evidence, lest the police be encouraged to execute warrants before they have been issued and before they have been properly presented to those persons at the scene of the intended search." United States v. Alvarez-Porras, supra., at 64-65.

The respondent might seek to distinguish Griffin, supra, by arguing that the entry there was "forcible" while the entry here was "peaceful". There is nothing peaceful about opening the door to one's apartment and being faced by several agents, guns drawn (although hidden behind their legs) who demand entry without seeking permission or presenting a warrant. Furthermore, it may be assumed that the agents would have entered the apartment by forcing Segura to unlock the door if no one had responded to their knock, and would have remained there until the hoped-for warrant arrived.

In a case where the police "secured" a hotel room for two hours (as opposed to a home for nineteen hours) while waiting for a warrant to arrive, it was held "that where a defendant establishes that the government illegally 'secured' and thereby seized evidence, and that seizure continues while the government procures a search warrant, the defendant has demonstrated a sufficient nexus between the illegality and the subsequently seized evidence notwithstanding any 'independent source' supporting the warrant." United States v. Allard, supra.

In a recent case in the Second Circuit, a co-defendant was arrested with half of the drugs that he was to sell to an undercover agent. He told the agent that the rest of the drugs

were in the defendant's apartment. The agents went to the apartment, saw a light on, and knocked on the door. The defendant's wife opened the door, and the agents went in and "walked through" the apartment. They did not arrest the wife, but treated her politely while awaiting a search warrant which arrived less than two hours later. The Court held that since the home was "secured" without a warrant, the evidence subsequently seized under a "valid" warrant must be suppressed. The Court noted "that the nature of the intrusion is particularly stark in the instant case because the warrantless entry was into a private residence." United States v. Levine, 500 F. Supp. 777 (W.D.N.Y. 1980). See also: State v. Bean, supra.

Most Courts that have decided this issue have been unable to distinguish the initial illegality of the entry and impoundment of the premises from the later seizure under a presumably valid warrant:

> "Analytically this case can be regarded simply as involving a de facto, inchoate seizure of the person and property of (the defendant) the moment the police began the illegal occupation. Thereafter the obtaining of the warrant could no more operate to disinfect this conduct than if the police had actually seized the individual, items sought to be suppressed prior to acquisition of the warrant." People v. Shuey, supra at 211.

Respondent's argument that the illegal conduct of the police was "peaceful" and that the police acted in "good faith" should not be a determinative factor in this case. In a State Court case that examined these issues closely, the premises were secured by the police in a "peaceful manner". The police made a security "walk-through" but did not search the premises. The police agreed with the occupants of the dwelling that, while awaiting a warrant, the police would leave but would watch the dwelling and its occupants through a window, and that anybody who wanted to leave would be frisked. Despite the "peacefulness" of the entry and impoundment, the Court found that the actions of the police had the effect of sealing the premises and of curtailing the occupants' freedom of movement within the house:

> "What the State proposes would necessarily contemplate that any time the police believe

> they have probable cause to search, however weak the foundation for their belief may turn out to be, they may with impunity intrude upon the privacy of a person's home, so long as they are then in the process of applying for a search warrant. And it would make no difference that a judge might later deny their application. To justify such a procedure, it would have to be presumed that where the police believe they have probable cause, the judge reviewing their application will also find probable cause. This, obviously, would not necessarily be the case. The potential for mischief and grave injustice is clearly evident and such a practice is not sanctioned by the Fourth Amendment. The siege and immobilization of the house and its occupants which lasted for a period of some seven hours before the search warrant arrived was patently inexcusable." State v. Dorson, supra. at 740.

The cases that appear to support respondent's position are distinguishable from the instant case. In United States v. Agapito, supra., for example, the impounded premises were an unoccupied hotel room. As mentioned earlier in this petition, the expectation of privacy in a hotel room is substantially less than that of a house or apartment.*

United States v. Fitzharris, 633 F.2d 416 (5th Cir. 1980) is based, in part, on the doctrine of "inevitable discovery", a doctrine which was rejected by the Second Circuit in United States v. Alvarez-Porras, supra.

In New Jersey v. Fenin, 381 A.2d 364, 154 N.J. Sup. 282 (1977), the defendant, who was arrested outside his residence, was brought back into his residence by the police, and both the police and the defendant awaited the search warrant. By being present while waiting for the warrant, unlike the instant case, the defendant could see to what extent the police conducted a search prior to the arrival of the warrant.

Here, there was nobody but the police in the apartment for nineteen hours. Although the agents testified at the suppression hearing that they did not conduct a full-fledged search until they received notification that the warrant had been signed by the magistrate, their being along in the apartment for so long a

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*The Court of Appeals found Agapito, supra., to be indistinguishable and relied solely upon that case to reverse the District Court's suppression on the evidence. United States v. Segura, 663 F.2d 411 at 416, (App. B).

period of time might well have led to a pre-warrant search that could not be attacked at the suppression hearing by the petitioners because of a lack of knowledge of what went on in the apartment for nineteen hours. It is not being argued that perjury occurred in this case, but that the situation the police found themselves in could lead to mischief and perjury. As the Supreme Court stated years ago, we must always have a check on police activity in regard to searches and seizures:

> "Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home." McDonald v. United States, 335 U.S. 451 456 (1948).

The extent of the police illegality in this case, the entry into a home, at night, without consent and without a warrant, the impounding and remaining in the home for nineteen hours, are inexcusable. "To validate the search of the apartment under the circumstances of this case would permit Goverment agents to take advantage of their own wrong." (App. A, 22). The "hope of vigorously enforcing the Fourth Amendment" can only be achieved by telling the government that the police conduct here cannot and will not be tolerated in a court of law, and that the protection of the Fourth Amendment will not be abrogated by the type of police misconduct shown here.

Petitioners in no way concede that the search warrant was valid. The government's affidavit in support of the warrant contained material misrepresentations without which there was no probable cause for the issuance of the warrant.

Special Agent Palombo submitted willful misrepresentations in support of the warrant to search petitioners' apartment as well as concealing facts necessary for the magistrate's deter-

mination.. This amounted to a complete usurpation of the magistrate's neutral and detached role, and was in complete derogation of petitioners' Fourth Amendment rights.

The false statements are contained in paragraphs 4 and 5 of Palombo's affidavit, as follows:

> 4. . . . Rivudalla further stated that SEGURA had told him that he (SEGURA) had an additional quantity of cocaine at his home. . . .
>
> 5. . . . Following his arrest SEGURA admitted that he kept additional quantities of narcotics in the apartment.

Palombo's suppression hearing testimony revealed his prior knowledge that these representations were untrue, and that the statements attributed to Segura and Rivudalla were, in fact, Palombo's own conclusions.*

> "At this time Rivduller (sic) was asked, did he believe that Segura still had the other half of a kilogram and Rivuduller stated that yes, he believed that Segura still had the other half of kilogram at his house. That was the sum or the essence of the conversation with respect to Segura." ** (P. 342, line 25, p. 343 lines 1-5)***

The knowing falsity as to paragraph 5 was revealed at transcript page 266:

> THE WITNESS: . . . At the time Mr. Segura stood up, looked over toward the other defendants and the statement was to the effect "The stuff in here is mine."
>
> THE COURT: That is not what you say in the affidavit.
>
> THE WITNESS: In my . . .
>
> THE COURT: The affidavit says "Following the arrest he admitted that he kept additional quantities of narcotics."
>
> THE WITNESS: That is what we took it to mean. (Lines 5-15).

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*Palombo obviously misrepresented Rivudalla's "belief" to be a statement of Segura's to circumvent the necessity under Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969), of demonstrating the reliability of the informer. An arrestees' information has often been deemed untrustworthy. Wong Sun v. United States, supra.; United States v. Karathanos, 531 F.2d 26 (2nd Cir. 1976).

**Rivudalla testified that he never stated Segura had additional cocaine at his house (p. 458).

***All page citations are to the transcript of the suppression hearing.

officers that probable cause exists." Giordenello v. United States, 357 U.S. 480 (1958).

Deprived of the perjured representations, the affidavit fails to establish probable cause to believe cocaine was in the apartment. Segura's arrest is insufficient to establish the apartment as a repository for narcotics.

> "The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that specific things to be searched are located on the property to which entry is sought." Zurcher v. Stanford Daily, 436 U.S. 547, 555 (1978).

Prior authority had also expressed this basic principle:

> "Search warrants may be issued only by a neutral and detached judicial officer, upon a showing of probable cause - that is, reasonable grounds to believe that criminally related objects are in the place which the warrant authorizes to be searched, at the time when the search is authorized to be conducted. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L.Rev. 348, 358 (1974).

Absent the false representations the only basis for the warrant, recited in the affidavit is Rivudalla's allegation that Segura was his supplier. This is wholly inadequate.

In United States v. Flanagan, 423 F.2d 745 (5th Cir. 1970), the fact that defendant, a known felon, had been arrested in possession of goods taken in a recent burglary and not yet recovered, coupled with the District Attorney's conclusory statement that he believed the remainder of the stolen jewelry to be concealed in defendant's residence was an inadequate basis for a search warrant. The affidavit had contained no factual observations nor other facts to indicate that the jewelry would be in defendant's residence.

United States v. Gramlich, 551 F.2d 1359 (5th Cir. 1977) held that the arrest of defendant and his admission of smuggling marijuana was an insufficient basis for a warrant to search his residence. See also: Gillespie v. United States, 368 F.2d (8th Cir. 1966), magistrate furnished information that accused possessed a gambling stamp and was engaged in gambling business, support-

This testimony clearly reveals the knowing and intentional falsity of the misrepresentations as well as Palombo's reckless disregard for the truth. Absent these perjured representations the affidavit fails to establish probable cause for a search of Apartment 3-D. Pursuant to Franks v. Delaware, 438 U.S. 154 (1978).the warrant was invalid and evidence seized from the apartment should have been excluded.

The affidavit requirement protects an individual's Fourth Amendment rights by assuring that probable cause will be determined by a neutral and detached magistrate, Johnson v. United States, 333 U.S. 10, apprised of sufficient facts upon which to make such an independant decision. Jones v. United States, 362 U.S. 257 (1960). The necessity of a sworn affidavit as a basis for the search warrant serves two purposes: (1) to ensure that the magistrate may judge for himself the persuasiveness of the precise facts, relied on to show probable cause; and (2) to provide a record upon which the reviewing court may properly determine the sufficiency of the facts presented to the magistrate to establish probable cause. Nathanson v. United States, 290 U.S. 41 (1932).

Agent Palombo's egregious conduct precluded the magistrate from exercising neutrality and detachment required by the Fourth Amendment. Had he been apprised of the agents' unlawful entry and consequent 19 hour occupation of petitioners' apartment, it is probable that the magistrate, cognizant of this violation of petitioners' rights would not have issued the warrant.

Submission of the perjured affidavit served to compound the flagrant disregard for Segura's rights illustrated by the concealment of the aforesaid facts. Having represented his own conclusions as actual statements of Rivudalla and Segura, Palombo again precluded an independant assessment of the objective facts. The agents' actions, throughout, were wholly repugnant to the Fourth Amendment.

> "There must be some basis apart from mere conclusory statements of the complaining

ed by affiant's conclusion that he had good reason to believe gambling devices were concealed at accused's residence; and United States v. Bailey, 327 F.Supp. 802 (N.D. Ill. 1977).

The case of United States v. Taylor, 599 F.2d 832 (8th Cir. 1979) is also instructive. In Taylor, supra., an agent purchased firearms from one Worley, who, though seen on these occasions outside Taylor's house, had never been observed entering or leaving the residence. The officers, thus having no indication of what transpired inside the house, did not have probable cause to believe the firearms had come from that residence and that additional firearms were contained therein. In language equally applicable to the instant case, the court stated:

> "To allege that probable cause existed to believe that firearms were located in the house of 1728 must of necessity rest on a conclusion or mere suspicion and this the Constitution forbids. We cannot employ the means of a judicial derrick to move contraband goods into a given location where, as here, the support rests solely on a conclusion or a suspicion and not founded on probable cause." Id at 837.

It is notable that in the instant case Agent Palombo, unlike the officers in Gillespie and Taylor, did not merely rely upon his own conclusions but represented those conclusions as affirmative statements of Rivudalla and Segura.

From the initial unlawful entry to the apartment to the perjured affidavit upon which the warrant and subsequent search was premised, the government's activity was illegal and in gross disregard of petitioners' Fourth Amendment rights. Deleting the perjured allegations, the affidavit contains no more than an "anemic suspicion" that cocaine would be in petitioners' apartment. United States v. Flanagan, supra.; United States v. Whitlow, 339 F.2d 975 (7th Cir. 1964). The Fourth Amendment requires the evidence seized pursuant to the warrant should have been excluded from evidence. A contrary ruling,

> . . . would reduce that Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. United States v. Flanagan, supra., at 747.

The Court of Appeals denied the petitioners' appeal in regard to this issue upon an erroneous application of the "law of the case" rule (App. C). Petitioners having prevailed on the suppression motion was not obligated to assert ancillary grounds to support the order nor was it incumbent upon petitioners to appeal that portion of the order which though adverse to them, was not determinative of that order.

The Court's reliance on McClain v. United States, 676 F.2d 915 (2nd Cir. 1982) is misplaced as in that case. The Court, in the earlier appeal, had explicitly held that the entire sentence could be vacated. In United States v. Segura supra, the Court of Appeals merely accepted the District Court's holding that the warrant was valid without undertaking any independant review of that finding. The sole focus of review was the validity of admitting the items seized subsequent to execution of the warrant, which was accepted as valid without question.

The mere reference to the issue in the prior appeal does not preclude further review. United States v. Bracewell, 569 F.2d 1194 (2nd Cir. 1978). In United States v, West, 453 F.2d 1351 (3rd Cir. 1972) defendant succeeding in having a shotgun suppressed but the court refused to suppress an inculpatory statement:

> Although the defendant has not appealed from that portion of the opinion denying his motion to suppress the statement, this will not preclude review of that ruling following conviction." Id at 1353 FN. 3

Moreover, the mere fact that petitioners could have argued the invalidity of the search warrant, in support of the suppression order, they were not required to do so. Additionally, Section 3371 under which the government appealed makes no provision for cross-appeal by the defendant. Thus petitioners did not forfeit their right to appellate review as to the validity of the warrant for appellees as they were under no obligation to raise that issue upon the government's appeal.

CONCLUSION

The warrantless entry into a dwelling and seizure of the dwelling for many hours while awaiting the contemplated issuance of a search warrant is a subject which strikes at the heart of the Fourth Amendment, and is extremely important in the administration of justice. Particularly in light of the split in the Circuits, review should be granted.

Respectfully submitted,

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APPENDIX "A"

FILED
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U.S. DISTRICT COURT E.D.N.Y.
★ MAY 19 1981 ★
TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

ANDRES SEGURA,
LUZ MARINA COLON,
ENRIQUE RIVUDALLA-VIDAL and
ESTHER PARRA,

Defendants.

81-CR-80(S)

Appearances:

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BARTELS, District Judge.

Andres Segura and Luz Marina Colon were charged in an indictment, (1) with conspiring to violate 21 U.S.C. § 841(a)(1), by intentionally distributing and possessing with intent to distribute quantities of cocaine, and (2) with three substantive counts of possession with intent to distribute and distribution on February 12, 1981 of 1/2 kilo of cocaine at one time, and 1 kilo of cocaine at another. Enrique Rivudalla-Vidal and Esther Parra were charged in one count of the same indictment with possession with intent to distribute 1/2 kilo of cocaine on the same day. In an opinion delivered from the bench, hereby clarified, this Court denied one motion by two of the defendants to suppress certain evidence, and granted another motion to suppress by two other defendants.

FACTS

In January, 1981, members of the New York Drug Enforcement Task Force received information from a liaison unit that certain persons were dealing heavily in cocaine out of an apartment located at 12-10 Astoria Park South in Queens. Undertaking physical surveillance of the building,

DEA agent Palumbo and N.Y.C. Detective Frawley ascertained that the occupants of the apartment were Segura and Colon. From about January 26, 1981 until the time of their arrest, Segura and Colon were under virtually constant surveillance by the agents. On February 7, Segura and Colon were observed moving into a new apartment on 147th Street in Flushing. On February 9, Segura was observed driving in an erratic and evasive manner until finally, after making two illegal U-turns, he stopped near the intersection of 221st Street and Northern Boulevard, where Rivudalla was awaiting him in the middle of the block. Rivudalla then got into Segura's car, and engaged in a brief conversation with Segura.

On February 12, the agents trailed Segura and Colon from their 147th Street apartment to the Burger King located at 222nd Street and Northern Boulevard in Queens, and observed them enter that establishment. Not long afterwards, Rivudalla and Parra, accompanied in their car by an unidentified male, drove into the Burger King lot and parked near Segura's car. Parra and the other male remained in the car while Rivudalla entered the Burger King, and sat down at a table with Segura. Colon was seated nearby. At a certain point, the agents observed Segura motion to Colon who, after stopping for a brief word at Segura's table, then exited to the lot carrying a large shoulder bag. The bag appeared to the agents to be bulging in the middle. Colon

then entered the car in which sat Parra and the other male, and exited it shortly thereafter, "zippering-up" the shoulder bag, which the agents observed to be "noticeably smaller in bulk then when she was observed entering the car."

Colon reentered the Burger King. Rivudalla remained for a few moments with Segura, and then left, re-entered his car, and drove off. The agents also drove off in two cars after them. At a certain point Rivudalla stopped to let off his male passenger, and then proceeded to 90th Street and 34th Avenue in Jackson Heights. Both Rivudalla and Parra exited the car, and began walking towards 90-10 34th Avenue when Detective Frawley, whose car was the first at the scene, approached the pair. According, to Frawley's testimony, Rivudalla became quite nervous as soon as Frawley identified himself, and Parra seemed almost faint, her eyes watering over. Frawley asked questions of Rivudalla concerning his license and registration which, when produced, showed two different addresses.

About this time Palumbo joined the trio, and asked Rivudalla from where he had just come. Rivudalla replied first, that he had just come from home, and then changed his answer and said that he had come from his place of work on 14th Street in Manhattan. Palumbo then asked if he had just come from the Burger King on Northern Boulevard, or if he knew someone named "Andre". Rivudalla replied

negatively to both questions. Thereupon Frawley asked Rivudalla whether he had a gun, to which he replied that he did not, and allowed Frawley to pat him down.

Palumbo then turned his attention to Parra, positioning himself in front of her while Frawley was opposite Rivudalla. He asked her in Spanish whether she had a gun. She shook her head, indicating "no." He then pointed to a paper bag he had observed her clutching under her arm, and asked her whether she had a gun in the bag. Parra shook her head again, indicating "no," and then extended the paper bag towards Palumbo, briefly opening it to establish the truth of her assertion. Palumbo, standing only 2-3 feet from her, was able to look down into the bag and see a glassine envelope containing white powder. Parra quickly closed the bag, and brought it back under her arm. Palumbo then motioned to her with his finger to give the bag to him, which she did, albeit reluctantly. Looking inside again, Palumbo confirmed his original observation of the glassine bag. Rivudalla and Parra were then immediately placed under arrest. The powder was field tested by the agents, and produced a positive reading for cocaine.

Rivudalla and Parra moved to suppress the 1/2 kilo of cocaine on the ground that their arrest was invalid because of an unauthorized Terry stop, which resulted in an invalid seizure at that time of the cocaine. Segura and

Colon, for their part, moved for suppression of the 1 kilo of cocaine, a .38 revolver, considerable amounts of currency, and various narcotics records and paraphernalia because of a warrantless entry and warrantless arrest of Colon at their apartment on 147th Street in Flushing, Queens on February 12-13, 1981. A full hearing was held at which the Court heard testimony from some of the officers involved in the arrests, searches, and seizures, and from defendant Rivudalla himself.

I. The "Terry" Stop

Both Rivudalla and Parra challenge the sufficiency of the Government's basis for detaining them on the street for investigative purposes. We, therefore, turn to the law governing this stop, arrest, and seizure. The general principle which governs such a stop is that given "specific and articulable facts which, taken together with rational inferences from those facts," warrant suspicion of criminal conduct on the part of specific individuals, investigating officers may briefly detain those individuals on the street to question them about their identities or even ask that they explain "suspicious circumstances." Terry v. Ohio, 392 U.S. 1, 21 (1968); United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975). The Court finds that the agents were able to point to such facts in Rivudalla and Parra's

case.

First, the meeting on February 9, 1981 between Rivudalla and Segura in Segura's car brought Rivudalla into the ongoing surveillance operation being conducted by the Drug Enforcement Task Force with respect to Segura and Colon. Second, the suspicious conduct occurring shortly before the stop at the Burger King (to wit, the agents' having observed Colon enter Rivudalla's car with a bulging shoulder bag, and exit with that bulge no longer present), could only increase the agents' suspicions that Rivudalla and Parra were engaged in a narcotics transaction with Segura and Colon. While these circumstances might have appeared to be ordinary when viewed by a layman, the experienced agents, used to the operating procedures of narcotics traffickers, were able to draw inferences of criminal conduct requiring an investigative stop.

At the threshold, it is necessary to decide the question whether Rivudalla as well as Parra is permitted to challenge the validity of the seizure. This inquiry, once considered to be one of "standing" to contest the seizure, has recently been deemed to be "simply whether the defendant's rights were violated by the allegedly illegal search or seizure". United States v. Salvucci, 100 S.Ct. 2547, 2551 n.4 (1980). In Salvucci the Court

abandoned the "automatic standing" rule of Jones v. United States, 362 U.S. 257 (1960), and held "that defendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated." 100 S.Ct. at 2549.

In the companion case of Rawlings v. Kentucky, 100 S.Ct. 2556 (1980), the Court explained that the key to resolving that Fourth Amendment inquiry was whether or not the defendant "possessed a 'legitimate expectation of privacy' in the area searched." Id. at 2561 (quoting Katz v. United States, 389 U.S. 347 (1967)). Most importantly for the purpose of this case, the Court also held that mere ownership of the property seized is insufficient to allow a defendant to challenge the search, without the further showing that the defendant "took normal precautions to maintain his privacy" in the goods he owned. 100 S.Ct. at 2561. In Rawlings the petitioner had placed certain drugs, concededly his, inside the purse of one of the occupants of the house in which he was arrested. In fact, at the time of his arrest he was seated next to that individual, and her purse was in the space between them. The Court held that the petitioner's Fourth Amendment rights had not been violated, since "the precipitous nature of the [transfer of drugs to her purse]" could not support the

inference that he maintained his privacy expectation. For one thing, petitioner did not have the right to exclude others from having access to the purse, nor had he ever "sought or received access to her purse prior to that sudden bailment." Id. And the Court held further that "even assuming ... that [the woman] did consent to the transfer of possession", the rapid, one-time transaction was not the sort of property transfer as would indicate that the petitioner had maintained his privacy expectation. Id.

Rivadulla seeks to fill in the gaps that existed in the petitioner's case in Rawlings, by an offer of proof that: a) Rivadulla was the owner of the 1/2 kilo of cocaine; b) Parra was his agent to receive the cocaine from Segura's agent Colon; c) following delivery to Parra, she was his bailee and the cocaine never left Rivadulla's sight, nor did Parra ever leave his sight; and d) that Rivadulla therefore took such precautions in excluding other people from having access to the paper bag as justify this Court's concluding that he maintained his expectation of privacy in the contents of that bag. The Court is of the opinion that even if Rivudalla had been able to establish the facts he offers to prove he would still fail to show a Fourth Amendment violation. One weakness in Rivudalla's bailment theory is that in fact it was shown that Rivudalla was not the pur-

chaser of the cocaine, but only held it on consignment from Segura.

Moreover, Rivadulla admits that at the time Colon allegedly delivered the cocaine to Parra, there was another male seated in the car with her. Rivudalla, remaining in the Burger King for a space of time following the delivery, was not in a position to exclude him from access to the paper bag. In addition, the Court of Appeals in this Circuit has held that unless an individual "signal[s] an expectation of privacy by taking special precautions to secure and secrete the contents of a container" which, like a paper bag, is "not 'inevitably' used for the transport or safeguarding of personal effects," that container is subject to a warrantless search. United States v. Mannino, 635 F.2d 110, 114 (1980) (unsecured plastic bag on car seat); accord, United States v. Markland, 635 F.2d 174, 177 (2d Cir. 1980) (closed plastic beverage bag lying on ground near overturned jeep). Quite simply, a bailment of a paper bag does not demonstrate that one has taken "normal precaution[s] to maintain [one's] privacy" under Katz and Rawlings.

Rivadulla's testimony is equivocal at best as to how the paper bag even got into his car. He is willing to state that once it did get into his car, it was "his", but this is sufficient only to show bare possession, not owner-

ship. Adopting the agents' testimony that Rivadulla failed to object to the actual seizure of the paper bag from Parra by Palumbo, the Court must conclude that Rivadulla had no expectation of privacy with respect to the cocaine in the bag held by Parra. As stated in Rawlings, "'arcane' concepts of property law ought [not] control the ability to claim the protections of the Fourth Amendment." 100 S.Ct. at 2562. While Rivadulla cannot challenge the propriety of the seizure, Parra can. The Court having decided that the police had a basis for the Terry stop, the next problem is whether they had probable cause for the arrest and search and seizure incident to that arrest. Facts quickly developed following the initial stop which matured the agents' reasonable suspicions into probable cause for the arrests. Specifically, the Court finds that the untruths told by Rivudalla when questioned concerning his whereabouts, and in particular his disclaimer of having just been at the Burger King with "Andre", coupled with the possession by Parra of a brown paper bag, Parra's and Rivudalla's extreme nervousness, and finally Parra's voluntary thrusting of the bag towards agent Palumbo in order to establish that she had no gun inside, gave the agents the probable cause they needed to arrest both Rivudalla and Parra. The turning point was the moment Palumbo glimpsed the glassine envelope with the white powder for the first time. At that juncture he was justified in

seizing the bag from Parra and placing both under arrest.

Counsel for defendant Parra has advanced the view that the questions asked by Palumbo of Parra -- specifically whether she had a gun in the paper bag -- were not related to the purpose of the stop, but were a mere ruse designed to allow him to look inside the bag for drugs. Since it is customary for those dealing in narcotics to carry guns, Palumbo was justified in asking the gun questions, even if his major purpose was to ascertain if she possessed any cocaine.

Accordingly, the motions to suppress the 1/2 kilo of cocaine are denied.

II. The Entry into the Apartment

Exigent Circumstances

Following the taking of Rivudalla and Parra into custody, Rivudalla made certain statements indicating to the agents that Segura probably possessed more cocaine in his apartment. From the statements, the agents also concluded, properly, that they had probable cause to arrest both Segura and Colon. Indeed, when Segura first contacted Rivudalla he offered to sell him one kilo of cocaine, but Rivudalla indicated he would buy only 1/2 kilo. The agents accordingly notified the Office of the United States Attorney

of the situation, and that according to Rivudalla's account, Rivudalla would be expecting a call from Segura later that same evening of February 12 to see whether the cocaine had been sold. Thereupon the agents sought, about 6:30 P.M., to obtain a search warrant for the apartment on 147th Street, so as to seize the cocaine before Segura would learn of Rivudalla's arrest and possibly destroy the cocaine in his possession.

On being informed that the lateness of the hour (6:30 P.M.) precluded them from being able to obtain a warrant until the following morning, the agents were advised by the Assistant United States Attorney to proceed directly to Segura's and Colon's apartment and arrest the pair and secure the premises pending the issuance of that warrant. They arrived around 7:30 P.M., and positioned themselves both outside the building and inside the fire stairway opening onto the third floor, the floor on which the apartment, 3D, was situated. From their fire stairway vantage point they were able to observe anyone entering or leaving 3D. While there, agent Shea of the Task Force placed his ear to the door of 3D, but heard nothing. After an uneventful three hours of waiting on the third floor, the agents inside the building joined the others outside, and all waited outside.

Around 11:15 P.M. Segura appeared, and as he began to enter the locked door at the lobby, he was apprehended, and placed in handcuffs under arrest. The agents, led by Shea, informed him that they wanted to go upstairs to 3D, to which Segura replied that he did not live in the building or in that apartment. Forcibly bringing him to the third floor, the agents began down the hallway, at which point Segura again resisted. Shea again forced him down the hallway to the door of 3D, an apartment which is located in the rear of the building, with no view of the front of the building where the arrest took place. Shea knocked on the door of 3D, with Segura standing, handcuffed, in front of him. Luz Colon, unknown to Shea at the time as such, opened the door. Detective Shea, without more, walked into the apartment with Segura in custody. He was then followed by two other agents, and five minutes later, by Palumbo. Neither Shea nor any other agent had an arrest warrant, or a search warrant. Nor did any of the officers ask for or receive consent to enter apartment 3D.

Upon entering, Shea saw, in addition to the woman they later learned to be Colon, two other women and one man. They were Ms. Alvarez, Ms. Castro, and Mr. Tobon-Castro. All were arrested forthwith. As Colon was about to be escorted out of the apartment, she indicated that she wished to take her shoulder bag with her. Thereupon Officer Prakin

of the Task Force opened it, and withdrew a leather toilet case, containing a loaded .38 revolver, which he promptly seized. The arrestees were then taken out, and driven to DEA headquarters. At least two agents remained in the building from the late hours of February 12, until around 6 P.M. the following day when they were finally notified of the issuance of a search warrant, and conducted a thorough search of the premises. There was thus a lapse of some 18-20 hours from the entry into the apartment to the execution of the search warrant, during which time the officers remained inside the apartment and in complete control of it. On searching the apartment, the agents found one kilo of cocaine, over $50,000 in U.S. currency, several rounds of .38 calibre ammunition, and records of narcotics transactions. In an earlier, cursory search of the apartment for the presence of other persons, the agents had turned up various items of narcotics paraphernalia, including a scale, jars of lactose, and a number of Baggies, all in plain view.

In the context of this background, the Court is persuaded that there was no consent to the entry of the apartment, no hot pursuit of any suspects, and no flushing of the toilet, scurrying of feet, or slamming of doors in agents' faces such as would indicate the imminent destruction of evidence. See Payton v. New York, 100 S.Ct. 1371

(1980); United States v. Gomez, 633 F.2d 999, 1007-08 (2d Cir. 1980); United States v. Levine, 500 F.Supp. 777 (W.D. N.Y. 1980). It is the Government's position that exigent circumstances existed, however, in that if the agents had not entered 3D and arrested the lessee, Colon, she would have been free to destroy any incriminating evidence or contraband during the time between Segura's arrest and the issuance of a valid warrant. The Court rejects that argument. In United States v. Agapito, 620 F.2d 324, 336 n.18 (2d Cir. 1980), the Court held that officers who arrest an individual outside of the premises may conduct a security check inside the premises only where "the arresting officers ... have (1) a reasonable belief that third persons are inside, and (2) a reasonable belief that the third persons are aware of the arrest outside so that they might destroy evidence, escape, or jeopardize the safety of the officers or the public." (Emphasis supplied.) Neither of these conditions were satisfied in this case. The agents were unaware of the presence of Luz Colon inside the apartment, based on their own surveillance of the premises from 7:30 to 10:30 P.M. Agent Shea testified, in fact, that he "did not" know whether anyone was in the apartment when he arrived, that he heard nothing when he listened, and that he was not able to see any lights on in the apartment. (Tr. at 394-96). Nor, as the Government argues, did it necessarily follow

that Colon was in the apartment just because she was not with Segura when he was arrested. One may reasonably infer that Segura's resisting the officers' wishes to go to 3D was due to his knowledge that there was cocaine in the apartment, assuming he had such knowledge, rather than that Colon was there.

As to the second condition, the third persons in the apartment only became aware of Segura's arrest when Shea knocked at the door and walked in with Segura in handcuffs. This was too late. There was no evidence whatsoever that before that moment anyone saw Segura being arrested, or even that anyone had seen Rivudalla and Parra being arrested, and communicated that information to the inhabitants of 3D. The police cannot "create their own exigencies through illegal conduct and then 'secure' the premises on the theory that the occupants would otherwise destroy evidence or flee." United States v. Allard, 634 F.2d 1182, 1187 (9th Cir. 1980).

The Government's reliance on United States v. Campbell, 581 F.2d 22, 25 (2d Cir. 1978), is misplaced. There the Court set forth the factors deemed relevant in determining whether there exists such an exigency as would justify a warrantless entry into a home. Notably absent in this case are factors numbered four and five, to wit, "strong reason to believe that the suspect is in the premises being

entered" and "a likelihood that the suspect will escape if not swiftly apprehended." The prudent course for the officers to have taken while awaiting a warrant was for them to have stationed themselves outside the apartment door, where they would not only have been able swiftly to apprehend Colon should she seek to flee, but would also have been in a position to hear the telltale signs that evidence was sought to be destroyed, signs that were not present here.

The officers in this case, absent exigent circumstances, had no right to cross the threshold of apartment 3D either to arrest Luz Colon, or to search for contraband. The entry in this case was illegal; Colon's arrest was illegal, and the search incident to that arrest, as well as the seizure of items in plain view in the apartment during a security check, was illegal. The fruits of the searches and seizures must be suppressed, to wit, the .38 calibre revolver and the narcotics paraphernalia.

Execution of the Search Warrant

The real problem in this case is the effect of the search warrant issued after the premises were illegally secured. After hearing the evidence, the Court concludes that there was sufficient information contained in the affidavit independent of any information that the agents

entered" and "a likelihood that the suspect will escape if not swiftly apprehended." The prudent course for the officers to have taken while awaiting a warrant was for them to have stationed themselves outside the apartment door, where they would not only have been able swiftly to apprehend Colon should she seek to flee, but would also have been in a position to hear the telltale signs that evidence was sought to be destroyed, signs that were not present here.

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Execution of the Search Warrant

The real problem in this case is the effect of the search warrant issued after the premises were illegally secured. After hearing the evidence, the Court concludes that there was sufficient information contained in the affidavit independent of any information that the agents

gathered at the time of the illegal entry to justify the issuance of the warrant by the magistrate. In other words, the warrant was valid. An important case governing the effect of a later, and valid warrant is United States v. Griffin, 502 F.2d 959 (6th Cir.), cert. denied, 419 U.S. 1050 (1974), where one agent sought to obtain a search warrant while other agents were dispatched to "secure" Griffin's apartment. On arriving at Griffin's apartment, the agents knocked on the door, and receiving no answer forcibly entered the premises. The agents were not in hot pursuit of anyone, and had no proof that anyone was in the apartment. Upon entry they conducted an initial seizure of items found in plain view. Four hours after the entry, during which time the agents remained in the apartment and in fact arrested one of the returning occupants, a warrant was issued and a thorough search conducted. There was no dispute that the affidavit upon which the search warrant was procured did not contain any facts discovered as a result of the initial entry. The Court held that the entry was illegal, on the ground that "police who believe they have probable cause to search cannot enter a home without a warrant merely because they plan subsequently to get one." Id. at 961. The Court found that evidence discovered pursuant to a later search must be suppressed on the ground that discovery was not "inevitable" merely because an

officer had been dispatched to obtain a warrant, and that to allow the police to proceed in such a manner "would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment." The facts in this case and the facts in Griffin are indistinguishable, since in neither case did exigent circumstances exist justifying a warrantless entry into the home.

The Court of Appeals in this Circuit has recently expressed some views on the principles here involved in the case of United States v. Alvarez-Porras, 643 F.2d 54 (2d Cir. 1981). In that case three searches were made of an apartment. One was held illegal by the district court. In the second search two hours later the Government agents had held the suspects in custody awaiting word that a search warrant, already applied for, had been issued. A distorted transmission came over the officers' portable radio which led them to believe that the warrant had been signed, pursuant to which they proceeded to search the apartment. In the course of the search they learned that the warrant had not been signed. Thereupon they temporarily discontinued the search. Later, when the warrant arrived, the third search was begun.

The Court held that the seizure of the incriminating evidence during the second search was proper since the agents

acted in good faith in trying to comply with the warrant requirement, and that the purposes of the exclusionary rule would not have been served by excluding the evidence. It stressed, however, that its decision did not rest on the broad exception for "inevitably discoverable material." Indeed, the Court relied on Griffin, supra, as an example of a case where "the purposes of the exclusionary rule were served by suppressing the evidence, lest the police be encouraged to execute warrants before they have beeen issued and before they have been properly presented to those persons at the scene of the intended search, [since] as a general matter ... [t]o allow officials to make an unlawful search and then repeat the search pursuant to a warrant would sanction the very misconduct the exclusionary rule was intended to proscribe." Further, the Court agreed that an unlawful search could not be validated simply by repeating the search pursuant to a valid warrant, citing Vale v. Louisiana, 399 U.S. 30 (1970). See Alvarez, 643 F.2d at 65.

Alvarez-Porras in no way justifies the admission of evidence seized in this case. Here the agents knew a warrant had not been issued, and accordingly the 18-20 hour delay in the issuance of the warrant, during which time the agents remained in illegal possession of the premises, rendered the execution of the warrant unreasonable within

the meaning of the Fourth Amendment, and deprived the lawful occupant of the apartment, Luz Colon, of her right freely to occupy and control the same. The evidence would not inevitably have been discovered. In fact, Colon might well have destroyed the evidence had she not been illegally excluded. The suppression of the evidence subsequently seized pursuant to the warrant would therefore serve the deterrent purposes of the exclusionary rule.

United States v. Galante, 547 F.2d 733 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977), relied on by the Government, is inapposite. In that case the chain of causation between the initial search and the subsequent seizure by the officers was broken by the intervening cooperation of the occupant, a fact not present in this case. To validate the search of the apartment under the circumstances of this case would permit Government agents to take advantage of their own wrong. The illegality of the initial entry and arrest, coupled with the unreasonableness of the delay in securing a warrant during the exclusion of Colon from her home, require the suppression of the evidence seized from that home on February 13, to wit, the kilo of cocaine, the currency, the .38 ammunition, and the narcotics records. The motions to suppress of Segura and Colon are hereby granted.

The foregoing constitutes the Court's findings of fact and conclusions of law as required by Rule 12(e), F.R.Cr.P.

SO ORDERED.

Dated: Brooklyn, N.Y.,
May 15, 1981.

John R. Bartels
United States District Judge

APPENDIX "B"

663 F.2d 411 (2nd Cir 1981)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1711—September Term 1980

(Argued: August 13, 1981 Decided: November 6, 1981)

Docket No. 81-1181

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

—against—

ANDRES SEGURA and LUZ MARINA COLON,

Defendants-Appellees.

Before:

MESKILL and KEARSE, *Circuit Judges,*
and COFFRIN, *District Judge.**

Appeal by the United States pursuant to 18 U.S.C. § 3731 from order of the United States District Court for the Eastern District of New York, John R. Bartels, *Judge,* suppressing evidence seized from defendants' apartment.

Affirmed in part and reversed in part.

* Honorable Albert W. Coffrin, of the United States District Court for the District of Vermont, sitting by designation.

PETER A. CHAVKIN, Assistant United States Attorney, Brooklyn, New York (Edward R. Korman, United States Attorney for the Eastern District of New York, Vivian Shevitz, Assistant United States Attorney, on the brief) *for Appellant.*

PAUL E. WARBURGH, JR., New York, New York (Axelrod & Warburgh, New York, New York, on the brief), *for Appellee Andres Segura.*

PETER J. FABRICANT, Brooklyn, New York, *for Appellee Luz Marina Colon.*

KEARSE, *Circuit Judge:*

The United States appeals from an order of the United States District Court for the Eastern District of New York, John R. Bartels, *Judge*, suppressing evidence seized by law enforcement officials from the apartment of defendants-appellees Andres Segura and Luz Marina Colon, who are charged in four counts of a five-count indictment with conspiracy to commit an offense under the narcotics laws in violation of 21 U.S.C. 846 (1976), and with possession and distribution of cocaine in violation of 21 U.S.C. § 841(a)(1) (1976). Some of the evidence seized from the apartment was discovered prior to the issuance of a search warrant and some was discovered in the search that followed issuance of the warrant. We affirm the district court's suppression of the pre-warrant evidence, but reverse the order to the extent that it suppressed evidence discovered after the issuance of the search warrant.

FACTS

In January 1981, members of the New York Drug Enforcement Task Force ("Task Force"), having received information relating to heavy trafficking in cocaine, had begun a virtually constant surveillance of Segura and Colon. On

February 12, at approximately 5:00 p.m., Task Force agents followed Segura and Colon to a Burger King in Queens, where they observed Segura and Colon effect what appeared to be the delivery of a bulky item to Enrique Rivudalla-Vidal and Esther Parra. The agents followed Rivudalla and Parra, and at approximately 5:30 stopped them for questioning. Upon learning that a paper bag carried by Parra contained a glassine bag of white powder, the agents placed Rivudalla and Parra under arrest. The white powder was eventually determined to be approximately one-half kilogram of cocaine. After being advised of his constitutional rights, Rivudalla stated that he had received the cocaine from Segura. He added that they had originally planned a one kilogram sale, but that he had requested the smaller quantity because he was unsure of his ability to sell a full kilogram, and that Segura was to telephone him at approximately 10 p.m. to learn whether he had been successful in selling the half kilogram.

At approximately 6:30 p.m., one of the agents telephoned an Assistant United States Attorney for the Eastern District of New York to request permission to arrest Segura and Colon and authorization to search their apartment. The Assistant authorized the arrests, but stated that a search warrant was unobtainable that evening and instructed the agent merely to secure the apartment without searching it.

At 7:30 p.m. three agents, led by Special Agent Patrick Shea of the United States Drug Enforcement Agency ("DEA"), who was assigned to the Task Force, set up surveillance of the defendants' apartment from the fire stairs near the door of the apartment, 3D. At that time the agents had no reason to believe anyone was inside the apartment. No lights were visible. Shea pressed his ear to the apartment door, but heard no sounds from within. Segura's car was not parked in the vicinity. For nearly three hours no one entered or left the apartment as the agents watched from the fire stairs. At about 10:30 the agents left the fire stairs to set up surveillance outside the building.

At approximately 11:15 p.m. Segura entered the building alone. The agents followed him into the vestibule and, as he unlocked the inner door, arrested him. Agent Shea told Segura they were going to "go up to the apartment." Segura denied living in the building, but the agents forcibly took him to apartment 3D. Shea knocked on the door, which was answered by a woman later identified as Colon. Shea showed his badge and told Colon that Segura had been arrested and that a search warrant was being obtained; then he and the other agents and Segura entered the apartment. The agents neither requested nor received permission to enter.

Once inside, the agents discovered three other persons present with Colon. Two of the agents immediately conducted a security check to ensure that no one else was present who might constitute a threat to their safety or destroy evidence. During this limited inspection they discovered a triple-beam scale and several jars of lactose in plain view on a bedroom table and numerous small cellophane bags in a bedroom closet.

Eventually, Colon was placed under arrest, and she, Segura, and the other three persons found in 3D were taken to DEA headquarters. As Colon was preparing to depart, she sought to take her shoulder bag with her. Before permitting this, one of the agents searched the bag for a weapon and discovered a loaded .38 caliber revolver and more than $2,000 in cash.

Two agents remained in the apartment to secure it until a search warrant was issued. Because of "administrative delays," application for the warrant was not presented to a magistrate until approximately 5 p.m. the following day. The warrant was issued and then executed at about 6 p.m., some nineteen hours after the intitial entry. In the search pursuant to the warrant agents discovered 1,250 grams of cocaine in an attache case, 58 grams of cocaine in the pocket of a coat in the bedroom closet, 18 rounds of .38 caliber ammunition, more than $50,000 in cash, and records of narcotics transactions. The agents seized all of these items, together with

the items discovered during the security check of the previous night.

This prosecution followed. Segura and Colon moved to suppress the items seized from their apartment on the ground that the entry and search violated their rights under the Fourth Amendment to the Constitution. The government contended that the entry into the defendants' apartment was justified by exigent circumstances because the agents feared Colon would destroy the evidence they believed was there before a search warrant could be obtained. After an evidentiary hearing, the district court ruled that the entry was not justified. Further, the court concluded that although the search warrant eventually obtained was valid, all of the evidence seized should be suppressed because the 19-hour delay made execution of the warrant unreasonable and because had it not been for the unlawful entry, the evidence seized might not have been there 19 hours later.

The government has appealed, as permitted by 18 U.S.C. § 3731 (1976), and renews here its contention that exigent circumstances justified the entry. In the event that we reject this argument, the government urges that we reverse the suppression of evidence other than the gun since that evidence was not "seized" until after issuance of the search warrant, or, alternatively, that we reverse the suppression order insofar as it related to evidence discovered after issuance of the warrant.

DISCUSSION

We conclude, on the authority of *United States v. Agapito*, 620 F.2d 324 (2d Cir.), *cert. denied*, 449 U.S. 834 (1980), that the entry was not justified, but that the evidence discovered pursuant to the valid search warrant should not have been suppressed.

A. *The Entry*

It is fundamental that warrantless searches and seizures are unreasonable within the meaning of the Fourth Amend-

ment unless they fall within one of the few, well-delineated exceptions to the warrant requirement. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971). The government argues that the warrantless entry of the Task Force agents into the apartment of Segura and Colon to prevent the destruction of evidence was lawful under an exception for "exigent circumstances." Although this Circuit has upheld a warrantless entry into an apartment for the purpose of preventing the destruction of evidence, *United States v. Vasquez*, 638 F.2d 507, 529-32 (2d Cir. 1980), we conclude that the prerequisites for such an entry were not met in the present case.

The preconditions that will justify a warrantless entry into premises, following an arrest outside, for a security check to prevent the destruction of evidence were set forth by this Court in *United States v. Agapito*, *supra*. There we stated that

> the arresting officers must have (1) a reasonable belief that third persons are inside, and (2) a reasonable belief that the third persons are aware of the arrest outside the premises so that they might destroy evidence, escape or jeopardize the safety of the officers or the public.

620 F.2d at 336 n.18. In *Agapito*, DEA agents had conducted a two-day surveillance of a 17th floor hotel room, following which they arrested, in the hotel lobby, the only two persons believed to have occupied the room. After the arrests the agents entered the room and seized a suitcase; they remained in the room intermittently for nearly twenty-four hours until a search warrant was obtained. We found that the actions of the agents satisfied neither prerequisite for a warrantless security check. First, the agents had no reason to believe that third persons were in the room, since their surveillance of the room had not revealed the presence of any occupants or visitors whom they had not already apprehended. Second,

the arrest of the occupants had taken place in the hotel lobby, seventeen floors removed from the room.

> Thus, even if the agents here thought that accomplices remained in the room, there was no reason for them to believe that the accomplices knew of the arrests so that they might destroy evidence . . . .

Id. at 336. Hence we held that the entry into the hotel room was unlawful.

Despite the differences in times and distances, we find no material distinction between *Agapito* and the present case. The Task Force members in the present case had kept apartment 3D under surveillance for some three hours, during which they had seen no lights, heard no sounds, even with an ear pressed against the door, and seen no person entering or leaving. They had no reasonable belief that anyone was in the apartment. We are unpersuaded by the government's argument that Segura's arrival at home alone made it reasonable to believe that Colon was already at home. She could as easily have been elsewhere, especially since there had been no signs whatever that 3D was occupied. Nor is there reason to reach a contrary conclusion on the basis of the government's argument that Segura might have learned, through his expected 10 o'clock call to Rivudalla or otherwise, that Rivudalla had been arrested. The surveilling agents heard no sound of a telephone ringing in 3D nor any other activity to suggest that anyone had communicated that information to Colon.

Even if Segura's arrival alone made it reasonable to suspect that Colon was in 3D, there was no reason to believe that anyone in the apartment knew of Segura's arrest and was therefore about to destroy evidence. The arrest took place in the lobby of the apartment building, two floors below the apartment. The arrest could not have been observed from 3D, and there was no evidence that anyone saw the arrest and reported it to the inhabitants of 3D.

The government nonetheless attempts to bring the agents'

actions within the second *Agapito* prerequisite by arguing that their knock at the door of 3D, along with the preceding commotion as they forcibly brought Segura to the apartment, alerted the inhabitants of the apartment to Segura's arrest and made it likely that they would destroy whatever evidence was there. Such exigency as inhered in these conditions, however, was of the agents' own making. They had no need to drag Segura to his apartment or to knock at the door. We will not expand the exception made for emergency security checks by permitting the agents to "create their own exigencies . . . and then 'secure' the premises on the theory that the occupants would otherwise destroy evidence." *United States v. Allard*, 634 F.2d 1182, 1187 (9th Cir. 1980); *United States v. Rosselli*, 506 F.2d 627, 630 (7th Cir. 1974) (agents' knocking at door, creating emergency, did not exempt them from warrant requirement: "when the emergency justification is advanced, we believe it is appropriate to appraise the agents' conduct during the entire period after they had a right to obtain a warrant and not merely from the moment when they knocked at the front door.")

The government's reliance on our decision in *United States v. Vasquez, supra*, in which we upheld a warrantless entry for a security check, is misplaced since that decision was based on several facts that are not present here. First, the pertinent arrests in *Vasquez* took place on the street, within sight of the fourth-floor apartment in question, thus creating the risk at the outset that the arrests were known to those remaining in the apartment. Further, the circumstances in *Vasquez* made it quite reasonable for the agents to believe that someone remained in the apartment. And finally, one of the persons arrested on the street led the officers to an apartment on the second floor and attempted to have the occupant of that apartment give a false story on his behalf; the second-floor occupant became hysterical and the ensuing commotion could not help but alert anyone remaining in the fourth-floor apartment. The commotion in *Vasquez* thus was not instigated by the agents' tactics but by the arrestee's deceit.

In the present case, we agree with the conclusion of the district court that a warrantless entry of 3D to conduct a security check was not justified by the circumstances and that that entry was therefore unlawful.

B. *The Post-Warrant Evidence*

Leaving aside for the moment the question of the evidence discovered upon the unlawful entry into the apartment, *see* C. *infra*, we turn to the question of the evidence discovered in the apartment after the issuance of the search warrant. The district court found that the warrant itself was valid, but ruled that the illegality of the initial entry, coupled principally with the unreasonableness of the delay in obtaining the warrant, required the suppression of the evidence discovered after the warrant was issued. We conclude that our prior decision in *United States v. Agapito*, *supra*, is controlling and requires the contrary result.

As discussed earlier, the agents in *Agapito* sought to justify their warrantless entry into a hotel room as a security check to prevent the destruction of evidence. We found the facts insufficient to justify a security check and ruled their entry unlawful. Notwithstanding the purported desire of the *Agapito* agents to make a quick security check, when they found the hotel room empty they did not simply secure it until a search warrant could be obtained; they "moved in" and remained there intermittently for nearly twenty-four hours before a warrant was obtained. During their unlawful stay in the room the agents seized a suitcase, although they did not at that time open it or otherwise search the room. Eventually a search warrant, which we held to be valid, was issued. Upon issuance of the warrant the agents searched the suitcase and discovered one kilogram of cocaine. Notwithstanding the illegal entry, the 24-hour delay in obtaining a warrant, and the agents' unlawful occupation of the room for that lengthy period, we held that the cocaine found in the suitcase should not be suppressed because the cocaine was discovered pursuant to a valid search warrant.

We find no difference in the facts of the present case sufficient to justify deviation from the result reached in *Agapito*. Here, as there, there was an unlawful entry in circumstances that did not justify the intended security check of the premises; here the agents remained unlawfully on the premises for nineteen hours prior to issuance of a search warrant, as compared with twenty-four in *Agapito*; here there was a valid warrant, as there was in *Agapito*; and here, as there, we deal with evidence discovered after the valid warrant issued.

The only difference between the present case and *Agapito* is that in *Agapito* the hotel room was empty, whereas there were people in the Segura-Colon apartment, a difference we do not consider material. The district court gave effect to this difference by hypothesizing that, had there been no illegal entry, Colon and her companions might have destroyed the evidence in the apartment prior to the issuance of the warrant. The hypothesis that had it not been for the unlawful entry perhaps no evidence would have been discovered lawfully is unpersuasive, in part because it is based on wholly speculative assumptions, such as (1) that having decided not to enter the apartment until a warrant was obtained, the agents would nevertheless have taken Segura to the apartment and alerted Colon; or (2) that having decided not to enter prior to obtaining a warrant the agents would not have kept the apartment under surveillance; or (3) that, once alerted, Colon would have sought to eliminate the evidence (including valuable cocaine and more than $50,000 in cash) by destroying it within the apartment rather than by removing it from the apartment, so that the agents would have no opportunity to intercept persons removing evidence; or (4) that the destruction of nearly three pounds of cocaine, more than $50,000 in cash, numerous cellophane bags, and documents would be achieved without the telltale sounds of repeated toilet flushings or an odoriferous fire; or (5) that a triple-beam scale and eighteen rounds of ammunition could be destroyed silently.

Further, we cannot uphold the district court's decision to penalize the unlawful entry simply on the basis that persons were in the apartment who might otherwise have destroyed the evidence, because we find such a basis prudentially unsound. Under Fourth Amendment jurisprudence the fact that such persons were present—meaning that the agents happened to be correct in one of the unsupported beliefs that led them to enter—does not legitimate the agents' entry; the reasonableness of the entry turns on the objective reasonableness of the beliefs, not on their accuracy. The effect of the district court's ruling, however, would be not only to preclude the officers' reliance on their happenstance accuracy, but in fact to penalize them for that accuracy. That is, upholding the district court's decision would mean that we suppress the evidence when, as here, the agents happened to be right in believing that there was someone in the premises to destroy it, while we do not suppress it where, as in *Agapito*, the agents' belief turned out to be wrong. We do not believe the appropriate protection of Fourth Amendment rights requires such an ironic twist.

In sum, *Agapito* is virtually indistinguishable from the present case and requires that the evidence discovered pursuant to the issuance of the valid search warrant not be suppressed.

C. *The Pre-Warrant Evidence*

Finally, we reject the government's argument that the evidence discovered during the unlawful security check should not be suppressed because it was not actually "seized" until after the search warrant was obtained. While *Agapito* allows use of evidence discovered after the issuance of a valid search warrant, it does not forbid suppression of evidence discovered upon an unlawful entry prior to the issuance of the warrant. We are not inclined to extend *Agapito* to allow use of the unlawfully discovered pre-warrant evidence in this case where the agents literally and figuratively went out of their way to create the circumstances that

they contend constituted the emergency justifying entry. In the words of *United States v. Rosselli, supra*, in which agents similarly knocked at the suspects' door and thus alerted them,

> [w]e do not suggest that the emergency which did develop was contrived by the agents. They had a right to pursue their investigation by seeking voluntary cooperation from a suspect. But certainly the emergency which did ensue was foreseeable. Moreover, this type of situation may reoccur repeatedly and might lend itself to too easy a by-pass of the constitutional requirement that probable cause should generally be assessed by a neutral and detached magistrate before the citizen's privacy is invaded.

506 F.2d at 630. Given the potential for abuse of the emergency security check exception by officers who would create their own emergencies, we believe it appropriate " 'to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' " *Brown v. Illinois*, 422 U.S. 590, 599-600 (1975), quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960). Accordingly, we uphold the suppression of such evidence as was discovered upon the unlawful entry.

CONCLUSION

The order of the district court is affirmed insofar as it suppressed items discovered prior to the issuance of the search warrant, and reversed insofar as it suppressed items discovered after issuance of the warrant.

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432 Park Ave. S., N.Y. 10016 (212) 686-5200

APPENDIX "C"

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the day of one thousand nine hundred and eighty-two.

Present: HONORABLE JAMES L. OAKES,

HONORABLE THOMAS J. MESKILL,

HONORABLE AMALYA L. KEARSE,

Circuit Judges,

UNITED STATES COURT OF APPEALS
FILED
JUN 29 1982
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- v. -

ANDRES SEGURA and LUZ MARINA COLON,

Defendants-Appellants.

Nos. 82-1062, 82-1064

82-1062
82-1064

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Defendants Andres Segura and Luz Marina Colon appeal from judgments entered in the United States District Court for the Eastern District of New York, after a jury trial before John R. Bartels, Judge, convicting them of conspiring to distribute cocaine, in violation of 21 U.S.C. § 846 (1976), and of distributing and possessing with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1). Finding no merit in any of their contentions on appeal, we affirm.

1. Defendants contend that various items found in their apartment and admitted at trial should have been suppressed because they were seized pursuant to a search warrant that was invalid in that it was procured on the basis of material

misrepresentations. This issue is foreclosed by reason of our prior ruling in this case in United States v. Segura, 663 F.2d 411 (2d Cir. 1981). On the prior appeal, the government sought to overturn a ruling of the district court suppressing all evidence seized in the apartment of Segura and Colon. The district court had ruled the search warrant valid, but had suppressed all evidence seized in the apartment on the ground that the initial entry of the government agents had been unlawful. The government requested a reversal as to all of the evidence seized, on the ground that the initial entry was necessitated by exigent circumstances, or alternatively a reversal as to some of the evidence, on the ground that it was discovered and seized pursuant to a valid search warrant issued after the initial entry. Notwithstanding that the validity of the warrant was the linchpin of the government's "fallback" position, the defendants never argued that the search warrant was invalid, although they were entitled to make such an argument in support of the suppression order. United States v. Swarovski, 557 F.2d 40, 49 (2d Cir. 1977) (citing Dandridge v. Williams, 397 U.S. 471, 475 n.6 (1970)), cert. denied, 434 U.S. 1045 (1978); see Smith v. Phillips, 102 S. Ct. 940, 945 n.6 (1982). Even after we accepted the government's alternative contention by reversing the suppression of the evidence seized after the issuance of the warrant, Segura and Colon did not challenge the validity of the warrant. They moved for rehearing, but asked that we reconsider our ruling allowing use of "the evidence discovered pursuant to the valid search warrant" solely on the ground that the case we had found controlling, United States v. Agapito, 620 F.2d 324 (2d Cir.), cert. denied, 449 U.S. 834 (1980), had been wrongly decided. (Petition of Segura and Colon for Rehearing, filed November 20, 1981, at 2.) Since Segura and Colon had adequate opportunities on the prior appeal to present their contentions as to the validity of the search warrant, we see no reason not to rule that our prior decision as to that issue is the law of the case. See McClain v. United States, 676 F.2d 915, 917 (2d Cir. 1982).

Even if the attack on the validity of the warrant were not foreclosed, however, we would reject it for lack of merit. Defendants have pointed to no evidence to suggest that the district court should have found the misstatements in the affidavit seeking issuance of the search warrant to be deliberate or reckless falsehoods. See Franks v. Delaware, 438 U.S. 154, 171-72 (1978). The misstatements alleged were the agent's interpretations of statements made to him, and his interpretation of Segura's use of the term "stuff" as referring to narcotics was consistent with common usage in the trade. See, e.g., United States v. Beltempo, 675 F.2d 472, 475 (2d Cir. 1982); United States v. Martino, 664 F.2d 860, 874 (2d Cir. 1981). The district court's implicit ruling that the variance between statements and interpretations was not material is not clearly erroneous.

2. Segura and Colon also contend that the evidence at trial was insufficient to support their convictions. The evidence included (1) the government agents' observations of a meeting between Segura and Enrique Rivdulla at a restaurant at which neither they nor anyone accompanying them obtained food; Segura's gesture to Colon who then left the restaurant with a bulging pocketbook, entered the automobile of Rivdulla, and

emerged moments later with no bulge in the purse; and the arrests minutes later of Rivdulla and his companion with a half kilogram of cocaine; and (2) the items found in the apartment of which Segura and Colon were co-lessees, including one kilogram of cocaine, $56,000 in cash, and a notebook apparently recording transactions with, inter alios, "Enrique." Viewing the evidence in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 80 (1942), we conclude that a rational juror could have concluded beyond a reasonable doubt that each defendant was guilty of conspiracy to distribute cocaine and of distribution of, and possession with intent to distribute, cocaine.

The judgments are affirmed.

JAMES L. OAKES

THOMAS J. MESKILL

AMALYA L. KEARSE,
Circuit Judges

IN THE SUPREME COURT OF THE UNITED STATES

----------x

ANDRES SEGURA and LUZ MARINA COLON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

----------x

AUG 27 1982

OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION TO PROCEED IN FORMA PAUPERIS

82-5298

Petitioners, Andres Segura and Luz Marina Colon, move this Court for permission to file the petition for a Writ of Certiorari and to further proceed in the Supreme Court of the United States in forma pauperis. The annexed affidavits of Paul E. Warburgh, Jr., Esq., and Peter J. Fabricant, Esq., support the motion.

AXELROD & WARBURGH
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TO:

EDWARD R. KORMAN, ESQ.
United States Attorney for the
Eastern District of New York
United States Courthouse
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Brooklyn, New York 11201

Solicitor General of the United States
United States Department of Justice
Washington, D.C. 20530

IN THE SUPREME COURT OF THE UNITED STATES

ANDRES SEGURA and LUZ MARINA COLON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

PETER J. FABRICANT, being duly sworn, deposes and says:

1. I am the attorney for the petitioner Luz Marina Colon. She was convicted in the United States District Court for the Eastern District of New York and her conviction was affirmed by the Court of Appeals for the Second Circuit. I am filing herewith a petition for a writ of certiorari to review the judgment in the Second Circuit.

2. I represented petitioner in the Second Circuit as assigned C.J.A. counsel. The appeal there proceeded in forma pauperis. I am aware of nothing which has changed her financial status, particularly since the petitioner has been incarcerated since her trial. Leave to proceed in forma pauperis in this Court should be granted as well.

Peter J. Fabricant
PETER J. FABRICANT

Sworn to before me this
26th day of August, 1982.

Immacolata Carpinelli

IMMACOLATA CARPINELLI
Notary Public, State of New York
No. 41-4704120
Qualified in Queens County
Commission Expires March 30, 1983

IN THE SUPREME COURT OF THE UNITED STATES

ANDRES SEGURA and LUZ MARINA COLON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

PAUL E. WARBURGH, JR., being duly sworn, deposes and says:

1. I am the attorney for the petitioner Andres Segura. He was convicted in the United States District Court for the Eastern District of New York and his conviction was affirmed by the Court of Appeals for the Second Circuit. I am filing herewith a petition for a writ of certiorari to review the judgment in the Second Circuit.

2. I represented petitioner in the Second Circuit as assigned C.J.A. counsel. The appeal there proceeded in forma pauperis. I am aware of nothing which has changed his financial status, particularly since the petitioner has been incarcerated since his arrest. Leave to proceed in forma pauperis in this Court should be granted as well.

Paul E. Warburgh Jr.

PAUL E. WARBURGH, JR.

Sworn to before me this
26th day of August, 1982.

Immaculata Carpinelli

IMMACOLATA CARPINELLI
Notary Public, State of New York
No. 41-4704120
Qualified in Queens County
Commission Expires March 30, 1983

Office-Supreme Court, U.S.
FILED
APR 1 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-5298

In the Supreme Court of the United States

OCTOBER TERM, 1982

ANDRES SEGURA AND LUZ MARINA COLON, PETITIONERS,

v.

UNITED STATES OF AMERICA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 27, 1982.
CERTIORARI GRANTED FEBRUARY 22, 1983

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RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Date	*Proceeding*
2/19/81	Indictment filed and sealed.
	* * *
2/27/81	. . . indictment unsealed . . . all defendants waived reading of indictment and pleaded not guilty to indictment. . .
	* * *
5/11/81	Before Bartels, J. case called. Defendants present . . . defendants arraigned on superceding indictment and enters plea of not guilty . . . Hearing on motions for suppression of statements and evidence . . . Ordered and begun. Hearing continued to 5/12/81 at 10 a.m.
	* * *
5/21/81	Before Bartels, J. case called. Defendants and counsel present. Hearing resumed. Government rests. . .
5/13/81	Before Bartels, J. case called Defendants and counsel present. Hearing resumed. Oral argument of defendant's motion by counsel. Hearing continued to 5/14/81 at 10 a.m.
5/14/81	Before Bartels, J. case called. Defendants and counsel present. Further oral argument of defendants Segura and Colon's motion to suppress evidence held. The court rules that the motion of defendants Segura and Colon for suppression of evidence are granted. . . Government to file interlocatory appeal.
	* * *
5/15/81	Government's notice of appeal filed.
5/19/81	By Bartels, J. memorandum of decision and order, dated 5/19/81 granting defendants Segura and Colon's motion to suppress evidence . . . filed.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

6/2/81	**Appellant, U.S.A., motion for expedited appeal filed.**
	* * *
6/11/81	**Order granted appellant, U.S.A. motion for expedited appeal filed . . .**
	* * *
8/13/81	**Case argued before: Meskil, Kearse, C.J.J., Coffrin, D.J.**
11/6/81	**Judgment affirmed in part and reversed in part, Kearse filed.**
	* * *

Date	*Proceeding*
11/20/81	Appellees, Segura and Colon, petition for rehearing with suggestion for rehearing in banc filed.
	* * *
12/30/81	Order denying appellees, Segura and Colon, petition for rehearing with suggestion for rehearing in banc filed.
1/7/82	Mandate issued (opinion and judgment).
	* * *

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

1/26/82	Before Bartels, J. case called. Defendants and counsel present. Trial ordered and begun...
	* * *
1/27/82	Before Bartels, J. case called. All sides present. Trial resumed...
1/28/82	Before Bartels, J. case called. All sides present ... Trial resumed ... Jury finds defendants, guilty to counts one, two, three, and five of superceding indictment ... Defendants' motion to set aside verdict and for judgment of acquittal reserved to Friday, 2/19/82. Sentencing set for 2/22/82.
	* * *
2/22/82	Before Bartels, J. case called. Counsel for all sides present. Defendants' motion for judgment of acquittal argued—denied. The defendant is sentenced to ... a total of ten years imprisonment plus a special parole term of fifteen years.
	* * *
	Defendant [Colon] is sentenced to ... a total of eight years imprisonment and a special parole term of fifteen years.
	* * *
2/22/82	Notice of appeal filed. Forma Pauperis granted.
	* * *

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

6/15/82	**Case argued before: Oakes, Meskill, Kearse, C.J.J.**
6/29/82	**Judgment affirmed by detailed court order without opinion filed.**
	* * *
9/2/82	**Notice of filing petition for certiorari with Supreme Court filed.**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

81-CR-80(S)

UNITED STATES OF AMERICA

-against-

ANDRES SEGURA, LUZ MARINA COLON,
ENRIQUE RIVUDALLA-VIDAL AND ESTHER PARRA,
DEFENDANTS.

DISTRICT COURT'S MEMORANDUM OF DECISION AND ORDER—MAY 15, 1981

BARTELS, District Judge.

Andres Segura and Luz Marina Colon were charged in an indictment, (1) with conspiring to violate 21 U.S.C. § 841(a)(1), by intentionally distributing and possessing with intent to distribute quantities of cocaine, and (2) with three substantive counts of possession with intent to distribute and distribution on February 12, 1981 of ½ kilo of cocaine at one time, and 1 kilo of cocaine at another. Enrique Rivudalla-Vidal and Esther Parra were charged in one count of the same indictment with possession with intent to distribute ½ kilo of cocaine on the same day. In an opinion delivered from the bench, hereby clarified, this Court denied one motion by two of the defendants to suppress certain evidence, and granted another motion to suppress by two other defendants.

FACTS

In January, 1981, members of the New York Drug Enforcement Task Force received information from a liaison unit that certain persons were dealing heavily in cocaine out of an apartment located at 12-10 Astoria Park South in Queens. Undertaking physical surveillance of the building, DEA agent Palumbo and N.Y.C. Detective Frawley ascertained that the occupants of the apartment were Segura and Colon. From about January 26, 1981 until the time of

their arrest, Segura and Colon were under virtually constant surveillance by the agents. On February 7, Segura and Colon were observed moving into a new apartment on 147th Street in Flushing. On February 9, Segura was observed driving in an erratic and evasive manner until finally, after making two illegal U-turns, he stopped near the intersection of 221st Street and Northern Boulevard, where Rivudalla was awaiting him in the middle of the block. Rivudalla then got into Segura's car, and engaged in a brief conversation with Segura.

On February 12, the agents trailed Segura and Colon from their 147th Street apartment to the Burger King located at 222nd Street and Northern Boulevard in Queens, and observed them enter that establishment. Not long afterwards, Rivudalla and Parra, accompanied in their car by an unidentified male, drove into the Burger King lot and parked near Segura's car. Parra and the other male remained in the car while Rivudalla entered the Burger King, and sat down at a table with Segura. Colon was seated nearby. At a certain point, the agents observed Segura motion to Colon who, after stopping for a brief word at Segura's table, then exited to the lot carrying a large shoulder bag. The bag appeared to the agents to be bulging in the middle. Colon then entered the car in which sat Parra and the other male, and exited it shortly thereafter, "zippering-up" the shoulder bag, which the agents observed to be "noticeably smaller in bulk then when she was observed entering the car."

Colon reentered the Burger King. Rivudalla remained for a few moments with Segura, and then left, reentered his car, and drove off. The agents also drove off in two cars after them. At a certain point Rivudalla stopped to let off his male passenger, and then proceeded to 90th Street and 34th Avenue in Jackson Heights. Both Rivudalla and Parra exited the car, and began walking towards 90-10 34th Avenue when Detective Frawley, whose car was the first at the scene, aproached the pair. According to Frawley's testimony, Rivudalla became quite nervous as soon as Frawley identified himself, and Parra seemed almost faint, her eyes watering over. Frawley asked questions of Rivudalla con-

cerning his license and registration which, when produced, showed two different addresses.

About this time Palumbo joined the trio, and asked Rivudalla from where he had just come. Rivudalla replied first, that he had just come from home, and then changed his answer and said that he had come from his place of work on 14th Street in Manhattan. Palumbo then asked if he had just come from the Burger King on Northern Boulevard, or if he knew someone named "Andre". Rivudalla replied negatively to both questions. Thereupon Frawley asked Rivudalla whether he had a gun, to which he replied that he did not, and allowed Frawley to pat him down.

Palumbo then turned his attention to Parra, positioning himself in front of her while Frawley was opposite Rivudalla. He asked her in Spanish whether she had a gun. She shook her head, indicating "no." He then pointed to a paper bag he had observed her clutching under her arm, and asked her whether she had a gun in the bag. Parra shook her head again, indicating "no," and then extended the paper bag towards Palumbo, briefly opening it to establish the truth of her assertion. Palumbo, standing only 2-3 feet from her, was able to look down into the bag and see a glassine envelope containing white powder. Parra quickly closed the bag, and brought it back under her arm. Palumbo then motioned to her with his finger to give the bag to him, which she did, albeit reluctantly. Looking inside again, Palumbo confirmed his original observation of the glassine bag. Rivudalla and Parra were then immediately placed under arrest. The powder was field tested by the agents, and produced a positive reading for cocaine.

Rivudalla and Parra moved to suppress the ½ kilo of cocaine on the ground that their arrest was invalid because of an unauthorized *Terry* stop, which resulted in an invalid seizure at that time of the cocaine. Segura and Colon, for their part, moved for suppression of the 1 kilo of cocaine, a .38 revolver, considerable amounts of currency, and various narcotics records and paraphernalia because of a warrantless entry and warrantless arrest of Colon at their apartment on 147th Street in Flushing, Queens on February 12-13, 1981. A full hearing was held at which the Court

heard testimony from some of the officers involved in the arrests, searches, and seizures, and from defendant Rivudalla himself.

I. THE "TERRY" STOP

Both Rivudalla and Parra challenge the sufficiency of the Government's basis for detaining them on the street for investigative purposes. We, therefore, turn to the law governing this stop, arrest, and seizure. The general principle which governs such a stop is that given "specific and articulable facts which, taken together with rational inferences from those facts," warrant suspicion of criminal conduct on the part of specific individuals, investigating officers may briefly detain those individuals on the street and question them about their identities or even ask that they explain "suspicious circumstances." *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975). The Court finds that the agents were able to point to such facts in Rivudalla and Parra's case.

First, the meeting of February 9, 1981 between Rivudall and Segura in Segura's car brought Rivudalla into the ongoing surveillance operation being conducted by the Drug Enforcement Task Force with respect to Segura and Colon. Second, the suspicious conduct occurring shortly before the stop at the Burger King (to wit, the agents' having observed Colon enter Rivudalla's car with a bulging shoulder bag, and exit with that bulge no longer present), could only increase the agents' suspicions that Rivudalla and Parra were engaged in a narcotics transaction with Segura and Colon. While these circumstances might have appeared to be ordinary when viewed by a layman, the experienced agents, used to the operating procedures of narcotics traffickers, were able to draw inferences of criminal conduct requiring an investigative stop.

At the threshold, it is necessary to decide the question whether Rivudalla as well as Parra is permitted to challenge the validity of the seizure. This inquiry, once considered to be one of "standing" to contest the seizure, has recently been deemed to be "simply whether the defendant's

rights were violated by the allegedly illegal search or seizure". *United States v. Salvucci*, 100 S.Ct. 2547, 2551 n.4 (1980). In *Salvucci* the Court abandoned the "automatic standing" rule of *Jones v. United States*, 362 U.S. 257 (1960), and held "that defendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated." 100 S.Ct. at 2549.

In the companion case of *Rawlings v. Kentucky*, 100 S.Ct. 2556 (1980), the Court explained that the key to resolving that Fourth Amendment inquiry was whether or not the defendant "possessed a 'legitimate expectation of privacy' in the area searched." *Id.* at 2561 (*quoting Katz v. United States*, 389 U.S. 347 (1967)). Most importantly for the purpose of this case, the Court also held that mere ownership of the property seized is insufficient to allow a defendant to challenge the search, without the further showing that the defendant "took normal precautions to maintain his privacy" in the goods he owned. 100 S.Ct. at 2561. In *Rawlings* the petitioner had placed certain drugs, concededly his, inside the purse of one of the occupants of the house in which he was arrested. In fact, at the time of his arrest he was seated next to that individual, and her purse was in the space between them. The Court held that the petitioner's Fourth Amendment rights had not been violated, since "the precipitous nature of the [transfer of drugs to her purse]" could not support the inference that he maintained his privacy expectation. For one thing, petitioner did not have the right to exclude others from having access to the purse, nor had he ever "sought or received access to her purse prior to that sudden bailment." *Id.* And the Court held further that "even assuming ... that [the woman] did consent to the transfer of possession", the rapid, one-time transaction was not the sort of property transfer as would indicate that the petitioner had maintained his privacy expectation. *Id.*

Rivadulla seeks to fill in the gaps that existed in the petitioner's case in *Rawlings*, by an offer of proof that: a) Rivadulla was the owner of the ½ kilo of cocaine; b) Parra was his agent to receive the cocaine from Segura's agent

Colon; c) following delivery to Parra, she was his bailee and the cocaine never left Rivadulla's sight, nor did Parra ever leave his sight; and d) that Rivadulla therefore took such precautions in excluding other people from having access to the paper bag as justify this Court's concluding that he maintained his expectation of privacy in the contents of that bag. The Court is of the opinion that even if Rivudalla had been able to establish the facts he offers to prove he would still fail to show a Fourth Amendment violation. One weakness in Rivudalla's bailment theory is that in fact it was shown that Rivudalla was not the purchaser of the cocaine, but only held it on consignment from Segura.

Moreover, Rivadulla admits that at the time Colon allegedly delivered the cocaine to Parra, there was another male seated in the car with her. Rivudalla, remaining in the Burger King for a space of time following the delivery, was not in a position to exclude him from access to the paper bag. In addition, the Court of Appeals in this Circuit has held that unless an individual "signal[s] an expectation of privacy by taking special precautions to secure and secrete the contents of a container" which, like a paper bag, is "not 'inevitably' used for the transport or safeguarding of personal effects," that container is subject to a warrantless search. *United States v. Mannino*, 635 F.2d 110, 114 (1980) (unsecured plastic bag on car seat); *accord*, *United States v. Markland*, 635 F.2d 174, 177 (2d Cir. 1980) (closed plastic beverage bag lying on ground near overturned jeep). Quite simply, a bailment of a paper bag does not demonstrate that one has taken "normal precaution[s] to maintain [one's] privacy" under *Katz* and *Rawlings*.

Rivadulla's testimony is equivocal at best as to how the paper bag even got into his car. He is willing to state that once it did get into his car, it was "his", but this is sufficient only to show bare possession, not ownership. Adopting the agent's testimony that Rivadulla failed to object to the actual seizure of the paper bag from Parra by Palumbo, the Court must conclude that Rivadulla had no expectation of privacy with respect to the cocaine in the bag held by Parra. As stated in *Rawlings*, "'arcane' concepts of property law ought [not] control the ability to claim

the protections of the Fourth Amendment." 100 S.Ct. at 2562. While Rivadulla cannot challenge the property of the seizure, Parra can. The Court having decided that the police had a basis for the *Terry* stop, the next problem is whether they had probable cause for the arrest and search and seizure incident to that arrest. Facts quickly developed following the initial stop which matured the agents' reasonable suspicions into probable cause for the arrests. Specifically, the Court finds that the untruths told by Rivudalla when questioned concerning his whereabouts, and in particular his disclaimer of having just been at the Burger King with "Andre", coupled with the possession by Parra of a brown paper bag, Parra's and Rivudalla's extreme nervousness, and finally Parra's voluntary thrusting of the bag towards agent Palumbo in order to establish that she had no gun inside, gave the agents the probable cause they needed to arrest both Rivudalla and Parra. The turning point was the moment Palumbo glimpsed the glassine envelope with the white powder for the first time. At that juncture he was justified in seizing the bag from Parra and placing both under arrest.

Counsel for defendant Parra has advanced the view that the questions asked by Palumbo of Parra—specifically whether she had a gun in the paper bag—were not related to the purpose of the stop, but were a mere ruse designed to allow him to look inside the bag for drugs. Since it is customary for those dealing in narcotics to carry guns, Palumbo was justified in asking the gun questions, even if his major purpose was to ascertain if she possessed any cocaine.

Accordingly, the motions to suppress the ½ kilo of cocaine are denied.

II. THE ENTRY INTO THE APARTMENT EXIGENT CIRCUMSTANCES

Following the taking of Rivudalla and Parra into custody, Rivudalla made certain statements indicating to the agents that Segura probably possessed more cocaine in his apartment. From the statements, the agents also concluded, properly, that they had probable cause to arrest both Segura and Colon. Indeed, when Segura first contacted

Rivudalla he offered to sell him one kilo of cocaine, but Rivudalla indicated he would buy only ½ kilo. The agents accordingly notified the Office of the United States Attorney of the situation, and that according to Rivudalla's account, Rivudalla would be expecting a call from Segura later that same evening of February 12 to see whether the cocaine had been sold. Thereupon the agent sought, about 6:30 P.M., to obtain a search warrant for the apartment on 147th Street, so as to seize the cocaine before Segura would learn of Rivudalla's arrest and possibly destroy the cocaine in his possession.

On being informed that the lateness of the hour (6:30 P.M.) precluded them from being able to obtain a warrant until the following morning, the agents were advised by the Assistant United States Attorney to proceed directly to Segura's and Colon's apartment and arrest the pair and secure the premises pending the issuance of that warrant. They arrived around 7:30 P.M., and positioned themselves both outside the building and inside the fire stairway opening onto the third floor, the floor on which the apartment, 3D, was situated. From their fire stairway vantage point they were able to observe anyone entering or leaving 3D. While there, agent Shea of the Task Force placed his ear to the door of 3D, but heard nothing. After an uneventful three hours of waiting on the third floor, the agents inside the building joined the others outside, and all waited outside.

Around 11:15 P.M. Segura appeared, and as he began to enter the locked door at the lobby, he was apprehended, and placed in handcuffs under arrest. The agents, led by Shea, informed him that they wanted to go upstairs to 3D, to which Segura replied that he did not live in the building or in that apartment. Forcibly bringing him to the third floor, the agents began down the hallway, at which point Segura again resisted. Shea again forced him down the hallway to the door of 3D, an apartment which is located in the rear of the building, with no view of the front of the building where the arrest took place. Shea knocked on the door of 3D, with Segura standing, handcuffed, in front of him. Luz Colon, unknown to Shea at the time as such, opened

the door. Detective Shea, without more, walked into the apartment with Segura in custody. He was then followed by two other agents, and five minutes later, by Palumbo. Neither Shea nor any other agent had an arrest warrant, or a search warrant. Nor did any of the officers ask for or receive consent to enter apartment 3D.

Upon entering, Shea saw, in addition to the woman they later learned to be Colon, two other women and one man. They were Ms. Alvarez, Ms. Castro, and Mr. Tobon-Castro. All were arrested forthwith. As Colon was about to be escorted out of the apartment, she indicated that she wished to take her shoulder bag with her. Thereupon Officer Prakin of the Task Force opened it, and withdrew a leather toilet case, containing a loaded .38 revolver, which he promptly seized. The arrestees were then taken out, and driven to DEA headquarters. At least two agents remained in the building from the late hours of February 12, until around 6 P.M. the following day when they were finally notified of the issuance of a search warrant, and conducted a thorough search of the premises. There was thus a lapse of some 18-20 hours from the entry into the apartment to the execution of the search warrant, during which time the officers remained inside the apartment and in complete control of it. On searching the apartment, the agents found one kilo of cocaine, over $50,000 in U.S. currency, several rounds of .38 calibre ammunition, and records of narcotics transactions. In an earlier, cursory search of the apartment for the presence of other persons, the agents had turned up various items of narcotics paraphernalia, including a scale, jars of lactose, and a number of Baggies, all in plain view.

In the context of this background, the Court is persuaded that there was no consent to the entry of the apartment, no hot pursuit of any suspects, and no flushing of the toilet, scurrying of feet, nor slamming of doors in agents' faces such as would indicate the imminent destruction of evidence. *See Payton v. New York*, 100 S.Ct. 1371 (1980); *United States v. Gomez*, 633 F.2d 999, 1007-08 (2d Cir. 1980); *United States v. Levine*, 500 F.Supp. 777 (W.D. N.Y. 1980). It is the Government's position that exigent circumstances existed, however, in that if the agents had

not entered 3D and arrested the lessee, Colon, she would have been free to destroy any incriminating evidence or contraband during the time between Segura's arrest and the issuance of a valid warrant. The Court rejects that argument. In *United States v. Agapito*, 620 F.2d 324, 336 n.18 (2d Cir. 1980), the Court held that officers who warrant an individual outside of the premises may conduct a security check inside the premises only where "the arresting officers ... have (1) a reasonable belief that third persons are inside, *and* (2) a reasonable belief that the third persons are aware of the arrest outside so that they might destory evidence, escape, or jeopardize the safety of the officers or the public." (Emphasis supplied.) Neither of these conditions were satisfied in this case. The agents were unaware of the presence of Luz Colon inside the apartment, based on their own surveillance of the premises from 7:30 to 10:30 P.M. Agent Shea testified, in fact, that he "did not" know whether anyone was in the apartment when he arrived, that he heard nothing when he listened, and that he was not able to see any lights on in the apartment. (Tr. at 394-96). Nor, as the Government argues, did it necessarily follow that Colon was in the apartment just because she was not with Segura when he was arrested. One may reasonably infer that Segura's resisting the officers' wishes to go to 3D was due to his knowledge that there was cocaine in the apartment, assuming he had such knowledge, rather than that Colon was there.

As to the second condition, the third persons in the apartment only became aware of Segura's arrest when Shea knocked at the door and walked in with Segura in handcuffs. This was too late. There was no evidence whatsoever that before that moment anyone saw Segura being arrested, or even that anyone had seen Rivudalla and Parra being arrested, and communicated that information to the inhabitants of 3D. The police cannot "create their own exigencies through illegal conduct and then 'secure' the premises on the theory that the occupants would otherwise destroy evidence or flee." *United States v. Allard*, 634 F.2d 1182, 1187 (9th Cir. 1980).

The Government's reliance on *United States v. Campbell*, 581 F.2d 22, 25 (2d Cir. 1978), is misplaced. There the Court set forth the factors deemed relevant in determining whether there exists such an exigency as would justify a warrantless entry into a home. Notably absent in this case are factors numbered four and five, to wit, "strong reason to believe that the suspect is in the premises being entered" and "a likelihood that the suspect will escape if not swiftly apprehended." The prudent course for the officers to have taken while awaiting a warrant was for them to have stationed themselves outside the apartment door, where they would not only have been able swiftly to apprehend Colon should she seek to flee, but would also have been in a position to hear the telltale signs that evidence was sought to be destroyed, signs that were not present here.

The officers in this case, absent exigent circumstances, had no right to cross the threshold of apartment 3D either to arrest Luz Colon, or to search for contraband. The entry in this case was illegal; Colon's arrest was illegal, and the search incident to that arrest, as well as the seizure of items in plain view of the apartment during a security check, was illegal. The fruits of the searches and seizures must be suppressed, to wit, the .38 calibre revolver and the narcotics paraphernalia.

EXECUTION OF THE SEARCH WARRANT

The real problem in this case is the effect of the search warrant issued after the premises were illegally secured. After hearing the evidence, the Court concludes that there was sufficient information contained in the affidavit independent of any information that the agents gathered at the time of the illegal entry to justify the issuance of the warrant by the magistrate. In other words, the warrant was valid. An important case governing the effect of a later, and valid warrant is *United States v. Griffin*, 502 F.2d 959 (6th Cir.), *cert. denied*, 419 U.S. 1050 (1974), where one agent sought to obtain a search warrant while other agents were dispatched to "secure" Griffin's apartment. On arriving at Griffin's apartment, the agents knocked on the

door, and receiving no answer forcibly entered the premises. The agents were not in a hot pursuit of anyone, and had no proof that anyone was in the apartment. Upon entry they conducted an initial seizure of items found in plain view. Four hours after the entry, during which time the agents remained in the apartment and in fact arrested one of the returning occupants, a warrant was issued and a thorough search conducted. There was no dispute that the affidavit upon which the search warrant was procured did not contain any facts discovered as a result of the initial entry. The Court held that the entry was illegal, on the ground that "police who believe they have probable cause to search cannot enter a home without a warrant merely because they plan subsequently to get one." *Id.* at 961. The Court found that evidence discovered pursuant to a later search must be suppressed on the ground that discovery was not "inevitable" merely because an officer had been dispatched to obtain a warrant, and that to allow the police to proceed in such a manner "would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment." The facts in this case and the facts in *Griffin* are indistinguishable, since in neither case did exigent circumstances exist justifying a warrantless entry into the home.

The Court of Appeals in this Circuit has recently expressed some views of the principles here involved in the case of *United States v. Alvarez-Porras*, 643 F.2d 54 (2d Cir. 1981). In that case three searches were made of an apartment. One was held illegal by the district court. In the second search two hours later the Government agents had held the suspects in custody awaiting word that a search warrant, already applied for, had been issued. A distorted transmission came over the officers' portable radio which led them to believe that the warrant had been signed, pursuant to which they proceeded to search the apartment. In the course of the search they learned that the warrant had not been signed. Thereupon they temporarily discontinued the search. Later, when the warrant arrived, the third search was begun.

The Court held that the seizure of the incriminating evidence during the second search was proper since the agents acted in good faith in trying to comply with the warrant requirement, and that the purposes of the exclusionary rule would not have been served by excluding the evidence. It stressed, however, that its decision did not rest on the broad exception for "inevitably discoverable material." Indeed, the Court relied on *Griffin, supra*, as an example of a case where "the purposes of the exclusionary rule were served by suppressing the evidence, lest the police be encouraged to execute warrants before they have been issued and before they have been properly presented to those persons at the scene of the intended search, [since] as a general matter . . . [t]o allow officials to make an unlawful search and then repeat the search pursuant to a warrant would sanction the very misconduct the exclusionary rule was intended to proscribe." Further, the Court agreed that an unlawful search could not be validated simply by repeating the search pursuant to a valid warrant, citing *Vale v. Louisiana*, 399 U.S. 30 (1970). *See Alvarez*, 643 F.2d at 65.

Alvarez-Porras in no way justifies the admission of evidence seized in this case. Here the agents knew a warrant had not been issued, and accordingly the 18-20 hour delay in the issuance of the warrant, during which time the agents remained in illegal possession of the premises, rendered the execution of the warrant unreasonable within the meaning of the Fourth Amendment, and deprived the lawful occupant of the apartment, Luz Colon, of her right freely to occupy and control the same. The evidence would not inevitably have been discovered. In fact, Colon might well have destroyed the evidence had she not been illegally excluded. The suppression of the evidence subsequently seized pursuant to the warrant would therefore serve the deterrent purposes of the exclusionary rule.

United States v. Galante, 547 F.2d 733 (2d cir. 1976), *cert. denied*, 431 U.S. 969 (1977), relied on by the Government, is inapposite. In that case the chain of causation between the initial search and the subsequent seizure by the officers was broken by the intervening cooperation of the occupant, a fact not present in this case. To validate the

search of the apartment under the circumstances of this case would permit Government agents to take advantage of their own wrong. The illegality of the initial entry and arrest, coupled with the unreasonableness of the delay in securing a warrant during the exclusion of Colon from her home, require the suppression of the evidence seized from that home on February 13, to wit, the kilo of cocaine, the currency, the .38 ammunition, and the narcotics records. The motions to suppress of Segura and Colon are hereby granted.

The foregoing constitutes the Court's findings of fact and conclusions of law as required by Rule 12(e), F.R.Cr.P.

SO ORDERED.

/s/ JOHN R. BARTELS
JOHN R. BARTELS
United States District Judge

Dated: Brooklyn, N.Y.,
May 15, 1981.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1711—September Term 1980

(Argued: August 13, 1981 Decided: November 6, 1981)

Docket No. 81-1181

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

—against—

ANDRES SEGURA AND LUZ MARINA COLON,
DEFENDANTS-APPELLEES.

OPINION—NOVEMBER 6, 1981

Before: MESKILL and KEARSE, *Circuit Judges*, and COFFRIN, *District Judge*.*

KEARSE, *Circuit Judge:*

The United States appeals from an order of the United States District Court for the Eastern District of New York, John R. Bartels, *Judge*, suppressing evidence seized by law enforcement officials from the apartment of defendants-appellees Andres Segura and Luz Marina Colon, who are charged in four counts of a five-count indictment with conspiracy to commit an offense under the narcotics laws in violation of 21 U.S.C. 846 (1976), and with possession and distribution of cocaine in violation of 21 U.S.C. § 841(a)(1) (1976). Some of the evidence seized from the apartment was discovered prior to the issuance of a search warrant and some was discovered in the search that followed issuance of the warrant. We affirm the district court's suppression of

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* Honorable Albert W. Coffrin, of the United States District Court for the District of Vermont, sitting by designation.

the pre-warrant evidence, but reverse the order to the extent that it suppressed evidence discovered after the issuance of the search warrant.

FACTS

In January 1981, members of the New York Drug Enforcement Task Force ("Task Force"), having received information relating to heavy trafficking in cocaine, had begun a virtually constant surveillance of Segura and Colon. On February 12, at approximately 5:00 p.m., Task Force agents followed Segura and Colon to a Burger King in Queens, where they observed Segura and Colon effect what appeared to be the delivery of a bulky item to Enrique Rivudalla-Vidal and Esther Parra. The agents followed Rivudalla and Parra, and at approximately 5:30 stopped them for questioning. Upon learning that a paper bag carried by Parra contained a glassine bag of white powder, the agents placed Rivudalla and Parra under arrest. The white powder was eventually determined to be approximately one-half kilogram of cocaine. After being advised of his constitutional rights, Rivudalla stated that he had received the cocaine from Segura. He added that they had originally planned a one kilogram sale, but that he had requested the smaller quantity because he was unsure of his ability to sell a full kilogram, and that Segura was to telephone him at approximately 10 p.m. to learn whether he had been successful in selling the half kilogram.

At approximately 6:30 p.m., one of the agents telephoned an Assistant United States Attorney for the Eastern District of New York to request permission to arrest Segura and Colon and authorization to search their apartment. The Assistant authorized the arrests, but stated that a search warrant was unobtainable that evening and instructed the agent merely to secure the apartment without searching it.

At 7:30 p.m. three agents, led by Special Agent Patrick Shea of the United States Drug Enforcement Agency ("DEA"), who was assigned to the Task Force, set up surveillance of the defendants' apartment from the fire stairs near the door of the apartment, 3D. At that time the agents had no reason to believe anyone was inside the apartment.

No lights were visible. Shea pressed his ear to the apartment door, but heard no sounds from within. Segura's car was not parked in the vicinity. For nearly three hours no one entered or left the apartment as the agents watched from the fire stairs. At about 10:30 the agents left the fire stairs to set up surveillance outside the building.

At approximately 11:15 p.m. Segura entered the building alone. The agents followed him into the vestibule and, as he unlocked the inner door, arrested him. Agent Segura told Segura they were going to "go up to the apartment." Segura denied living in the building, but the agents forcibly took him to apartment 3D. Shea knocked on the door, which was answered by a woman later identified as Colon. Shea showed his badge and told Colon that Segura had been arrested and that a search warrant was being obtained; then he and the other agents and Segura entered the apartment. The agents neither requested nor received permission to enter.

Once inside, the agents discovered three other persons present with Colon. Two of the agents immediately conducted a security check to ensure that no one else was present who might constitute a threat to their safety or destroy evidence. During this limited inspection they discovered a triple-beam scale and several jars of lactose in plain view on a bedroom table and numerous small cellophane bags in a bedroom closet.

Eventually, Colon was placed under arrest, and she, Segura, and the other three persons found in 3D were taken to DEA headquarters. As Colon was preparing to depart, she sought to take her shoulder bag with her. Before permitting this, one of the agents searched the bag for a weapon and discovered a loaded .38 caliber revolver and more than $2,000 in cash.

Two agents remained in the apartment to secure it until a search warrant was issued. Because of "administrative delays," application for the warrant was not presented to a magistrate until approximately 5 p.m. the following day. The warrant was issued and then executed at about 6 p.m., some nineteen hours after the initial entry. In the search pursuant to the warrant agents discovered 1,250 grams of

cocaine in an attache case, 58 grams of cocaine in the pocket of a coat in the bedroom closet, 18 rounds of .38 caliber ammunition, more than $50,000 in cash, and records of narcotics transactions. The agents seized all of these items, together with the items discovered during the security check of the previous night.

This prosecution followed. Segura and Colon moved to suppress the items seized from their apartment on the ground that the entry and search violated their rights under the Fourth Amendment to the Constitution. The government contended that the entry into the defendants' apartment was justified by exigent circumstances because the agents feared Colon would destroy the evidence they believed was there before a search warrant could be obtained. After an evidentiary hearing, the district court ruled that the entry was not justified. Further, the court concluded that although the search warrant eventually obtained was valid, all of the evidence seized should be suppressed because the 19-hour delay made execution of the warrant unreasonable and because had it not been for the unlawful entry, the evidence seized might not have been there 19 hours later.

The government has appealed, as permitted by 18 U.S.C. § 3731 (1976), and renews here its contention that exigent circumstances justified the entry. In the event that we reject this argument, the government urges that we reverse the suppression of evidence other than the gun since that evidence was not "seized" until after issuance of the search warrant, or, alternatively, that we reverse the suppression order insofar as it related to evidence discovered after issuance of the warrant.

DISCUSSION

We conclude, on the authority of *United States v. Agapito*, 620 F.2d 324 (2d Cir.), *cert. denied*, 449 U.S. 834 (1980), that the entry was not justified, but that the evidence discovered pursuant to the valid search warrant should not have been suppressed.

A. *The Entry*

It is fundamental that warrantless searches and seizures are unreasonable within the meaning of the Fourth Amendment unless they fall within one of the few, well-delineated exceptions to the warrant requirement. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971). The government argues that the warrantless entry of the Task Force agents into the apartment of Segura and Colon to prevent the destruction of evidence was lawful under an exception for "exigent circumstances." Although this Circuit has upheld a warrantless entry into an apartment for the purpose of preventing the destruction of evidence, *United States v. Vasquez*, 638 F.2d 507, 529-32 (2d Cir.1 980), we conclude that the prerequisites for such an entry were not met in the present case.

The preconditions that will justify a warrantless entry into premises, following an arrest outside, for a security check to prevent the destruction of evidence were set forth by this Court in *United States v. Agapito, supra*. There we stated that

> the arresting officers must have (1) a reasonable belief that third persons are inside, and (2) a reasonable belief that the third persons are aware of the arrest outside the premises so that they might destroy evidence, escape or jeopardize the safety of the officers or the public.

620 F.2d at 336 n.18. In *Agapito*, DEA agents had conducted a two-day surveillance of a 17th floor hotel room, following which they arrested, in the hotel lobby, the only two persons believed to have occupied the room. After the arrests the agents entered the room and seized a suitcase; they remained in the room intermittently for nearly twenty-four hours until a search warrant was obtained. We found that the actions of the agents satisfied neither prerequisite for a warrantless security check. First, the agents had no reason to believe that third persons were in the room, since their surveillance of the room had not revealed the presence of any occupants or visitors whom they had not already apprehended. Second, the arrest of the occu-

pants had taken place in the hotel lobby, seventeen floors removed from the room.

> Thus, even if the agents here thought that accomplices remained in the room, there was no reason for them to believe that the accomplices knew of the arrests so that they might destroy evidence...

Id. at 336. Hence we held that the entry into the hotel room was unlawful.

Despite the differences in times and distances, we find no material distinction between *Agapito* and the present case. The Task Force members in the present case had kept apartment 3D under surveillance for some three hours, during which they had seen no lights, heard no sounds, even with an ear pressed against the door, and seen no person entering or leaving. They had no reasonable belief that anyone was in the apartment. We are unpersuaded by the government's argument that Segura's arrival at home alone made it reasonable to believe that Colon was already at home. She could as easily have been elsewhere, especially since there had been no signs whatever that 3D was occupied. Nor is there reason to reach a contrary conclusion on the basis of the government's argument that Segura might have learned, through his expected 10 o'clock call to Rivudalla or otherwise, that Rivudalla had been arrested. The surveilling agents heard no sound of a telephone ringing in 3D nor any other activity to suggest that anyone had communicated that information to Colon.

Even if Segura's arrival alone made it reasonable to suspect that Colon was in 3D, there was no reason to believe that anyone in the apartment knew of Segura's arrest and was therefore about to destroy evidence. The arrest took place in the lobby of the apartment building, two floors below the apartment. The arrest could not have been observed from 3D, and there was no evidence that anyone saw the arrest and reported it to the inhabitants of 3D.

The government nonetheless attempts to bring the agents' actions within the second *Agapito* prerequisite by arguing that their knock at the door of 3D, along with the preceding commotion as they forcibly brought Segura to the apartment, alerted the inhabitants of the apartment to

Segura's arrest and made it likely that they would destroy whatever evidence was there. Such exigency as inhered in these conditions, however, was of the agents' own making. They had no need to drag Segura to his apartment or to knock at the door. We will not expand the exception made for emergency security checks by permitting the agents to "create their own exigencies . . . and then 'secure' the premises on the theory that the occupants would otherwise destroy evidence." *United States v. Allard*, 634 F.2d 1182, 1187 (9th Cir. 1980); *United States v. Rosselli*, 506 F.2d 627, 630 (7th Cir. 1974) (agents' knocking at door, creating emergency, did not exempt them from warrant requirement: "when the emergency justification is advanced, we believe it is appropriate to appraise the agents' conduct during the entire period after they had a right to obtain a warrant and not merely from the moment when they knocked at the front door.")

The government's reliance on our decision in *United States* v. *Vasquez*, *supra*, in which we upheld a warrantless entry for a security check, is misplaced since that decision was based on several facts that are not present here. First, the pertinent arrests in *Vasquez* took place on the street, within sight of the fourth-floor apartment in question, thus creating the risk at the outset that the arrests were known to those remaining in the apartment. Further, the circumstances in *Vasquez* made it quite reasonable for the agents to believe that someone remained in the apartment. And finally, one of the persons arrested on the street led the officers to an apartment on the second floor and attempted to have the occupant to that apartment give a false story on his behalf; the second-floor occupant became hysterical and the ensuing commotion could not help but alert anyone remaining in the fourth-floor apartment. The commotion in *Vasquez* thus was not instigated by the agents' tactics but by the arrestee's deceit.

In the present case, we agree with the conclusion of the district court that a warrantless entry of 3D to conduct a security check was not justified by the circumstances and that that entry was therefore unlawful.

B. *The Post-Warrant Evidence*

Leaving aside for the moment the question of the evidence discovered upon the unlawful entry into the apartment, *see* C, *infra*, we turn to the question of the evidence discovered in the apartment after the issuance of the search warrant. The district court found that the warrant itself was valid, but ruled that the illegality of the initial entry, coupled principally with the unreasonableness of the delay in obtaining the warrant, required the suppression of the evidence discovered after the warrant was issued. We conclude that our prior decision in *United States v. Agapito*, *supra*, is controlling and requires the contrary result.

As discussed earlier, the agents in *Agapito* sought to justify their warrantless entry into a hotel room as a security check to prevent the destruction of evidence. We found the facts insufficient to justify a security check and ruled their entry unlawful. Notwithstanding the purported desire of the *Agapito* agents to make a quick security check, when they found the hotel room empty they did not simply secure it until a search warrant could be obtained; they "moved in" and remained there intermittently for nearly twenty-four hours before a warrant was obtained. During their unlawful stay in the room the agents seized a suitcase, although they did not at that time open it or otherwise search the room. Eventually a search warrant, which we held to be valid, was issued. Upon issuance of the warrant the agents searched the suitcase and discovered one kilogram of cocaine. Notwithstanding the illegal entry, the 24-hour delay in obtaining a warrant, and the agents' unlawful occupation of the room for that lengthy period, we held that the cocaine found in the suitcase should not be suppressed because the cocaine was discovered pursuant to a valid search warrant.

We find no difference in the facts of the present case sufficient to justify deviation from the result reached in *Agapito*. Here, as there, there was an unlawful entry in circumstances that did not justify the intended security check of the premises; here the agents remained unlawfully on the premises for nineteen hours prior to issuance of a

search warrant, as compared with twenty-four in *Agapito*; here there was a valid warrant, as there was in *Agapito*; and here, as there, we deal with evidence discovered after the valid warrant issued.

The only difference between the present case and *Agapito* is that in *Agapito* the hotel room was empty, whereas there were people in the Segura-Colon apartment, a difference we do not consider material. The district court gave effect to this difference by hypothesizing that, had there been no illegal entry, Colon and her companions might have destroyed the evidence in the apartment prior to the issuance of the warrant. The hypothesis that had it not been for the unlawful entry perhaps no evidence would have been discovered lawfully is unpersuasive, in part because it is based on wholly speculative assumptions, such as (1) that having decided not to enter the apartment until a warrant was obtained, the agents would nevertheless have taken Segura to the apartment and alerted Colon; or (2) that having decided not to enter prior to obtaining a warrant the agents would not have kept the apartment under surveillance; or (3) that, once alerted, Colon would have sought to eliminate the evidence (including valuable cocaine and more than $50,000 in cash) by destroying it within the apartment rather than by removing it from the apartment, so that the agents would have no opportunity to intercept persons removing evidence; or (4) that the destruction of nearly three pounds of cocaine, more than $50,000 in cash, numerous celophane bags, and documents would be achieved without the telltale sounds of repeated toilet flushings or an odoriferous fire; or (5) that a triple-beam scale and eighteen rounds of ammunition could be destroyed silently.

Further, we cannot uphold the district court's decision to penalize the unlawful entry simply on the basis that persons were in the apartment who might otherwise have destroyed the evidence, because we find such a basis prudentially unsound. Under Fourth Amendment jurisprudence the fact that such persons were present—meaning that the agents happened to be correct in one of the unsupported beliefs that led them to enter—does not legitimate the agents'

entry; the reasonableness of the entry turns on the objective reasonableness of the beliefs, not on their accuracy. The effect of the district court's ruling, however, would be not only to preclude the officers' reliance on their happenstance accuracy, but in fact to penalize them for that accuracy. That is, upholding the district court's decision would mean that we suppress the evidence when, as here, the agents happened to be right in believing that there was someone in the premises to destroy it, while we do not suppress it where, as in *Agapito*, the agents' belief turned out to be wrong. We do not believe the appropriate protection of Fourth Amendment rights requires such an ironic twist.

In sum, *Agapito* is virtually indistinguishable from the present case and requires that the evidence discovered pursuant to the issuance of the valid search warrant not be suppressed.

C. *The Pre-Warrant Evidence*

Finally, we reject the government's argument that the evidence discovered during the unlawful security check should not be suppressed because it was not actually "seized" until after the search warrant was obtained. While *Agapito* allows use of evidence discovered after the issuance of a valid search warrant, it does not forbid suppression of evidence discovered upon an unlawful entry prior to the issuance of the warrant. We are not inclined to extend *Agapito* to allow use of the unlawfully discovered pre-warrant evidence in this case where the agents literally and figuratively went out of their way to create the circumstances that they contend constituted the emergency justifying entry. In the words of *United States v. Rosselli*, *supra*, in which agents similarly knocked at the suspects' door and thus alerted them,

> [w]e do not suggest that the emergency which did develop was contrived by the agents. They had a right to pursue their investigation by seeking voluntary cooperation from a suspect. But certainly the emergency which did ensue was foreseeable. Moreover, this type of situation may reoccur repeatedly and might lend itself to too easy a by-pass of the constitutional requirement that probable cause should generally be assessed

> by a neutral and detached magistrate before the citizen's privacy is invaded.

506 F.2d at 630. Given the potential for abuse of the emergency security check exception by officers who would create their own emergencies, we believe it appropriate "'to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'" *Brown v. Illinois*, 422 U.S. 590, 599-600 (1975), quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960). Accordingly, we uphold the suppression of such evidence as was discovered upon the unlawful entry.

CONCLUSION

The order of the district court is affirmed insofar as it suppressed items discoverd prior to the issuance of the search warrant, and reversed insofar as it suppressed items discovered after issuance of the warrant.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

(T. 21, U.S.C. §§ 841(a)(1) and 846)

UNITED STATES OF AMERICA

—against—

PREMISES KNOWN AND DESCRIBED AS APT. 3D,
37-07 147TH STREET FLUSHING, NEW YORK

AFFIDAVIT FOR A SEARCH WARRANT

EASTERN DISTRICT OF NEW YORK, SS:

ROBERT PALUMBO, being duly sworn, deposes and says that he is a Special Agent of the Drug Enforcement Administration, duly appointed according to law and acting as such.

Upon information and belief, there is currently being concealed in APT. 3D, 37-07 147th STREET, FLUSHING, NEW YORK narcotics, the proceeds of narcotics transactions, documents evidencing narcotics transactions and narcotics paraphenalia.

The source of your deponent's information and the grounds for his belief are:

1. At approximately 5:25 p.m., on February 12, 1981, ENRIQUE RIVADULLA and ESTHER PARRA were arrested by agents of the Drug Enforcement Administration on the street in front of 90-10 34th Avenue, Jackson Heights, New York in possession of approximately one pound of cocaine.

2. Following his arrest, RIVADULLA informed agents that he received the cocaine from an individual named ANDREAS SEGURA earlier that day at a Burger King Restaurant located at 223rd Street and Northern Boulevard, Bayside, Queens.

3. Surveillance by your deponent and other members of the Drug Enforcement Administration earlier that day confirmed that RIVADULLA and SEGURA had in fact met

earlier that day at the above-described Burger King Restaurant.

4. RIVADULLA further stated that SEGURA had told him that he (SEGURA) had an additional quantity of cocaine at his home. Based upon prior surveillance of SEGURA by the Drug Enforcement Administration, it has been determined that SEGURA resides at 37-07 147th Street, Apt. 3D, Flushing, Queens, New York.

5. At approximately 6:00 p.m. on February 12, 1981, agents of the Drug Enforcement Administration went to 37-07 147th STREET, QUEENS, NEW YORK to secure the premises in the anticipation of obtaining a search warrant. At approximately 11:15 p.m., agents observed SEGURA approach apartment 3D at the location and attempt to enter. At that time SEGURA was placed under arrest. Following his arrest SEGURA admitted that he kept additional quantities of narcotics in the apartment.

WHEREFORE, your deponent respectfully requests that a warrant issue to the said deponent or any other Special Agent of the Drug Enforcement Administration authorizing him to search the premises at APT. 3D, 37-07 147th STREET, FLUSHING, NEW YORK, for narcotics, the proceeds of narcotics transactions, documents evidencing narcotics transactions and narcotics paraphenalia.

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_____

A TRUE COPY

_____

U.S.M. E.D.N.Y.

Sworn to before me this 13th day of February, 1981

_____

UNITED STATES MAGISTRATE
EASTERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 82-1062, 82-1064

UNITED STATES OF AMERICA, APPELLEE,

v.

ANDRES SEGURA AND LUZ MARINA COLON,
DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the Eastern District of New York

OPINION—JUNE 29, 1982

Present: HONORABLE JAMES L. OAKES, HONORABLE THOMAS J. MESKILL, HONORABLE AMALYA L. KEARSE, *Circuit Judges*,

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Defendants Andres Segura and Luz Marina Colon appeal from judgments entered in the United States District Court for the Eastern District of New York, after a jury trial before John R. Bartels, Judge, convicting them of conspiring to distribute cocaine, in violation of 21 U.S.C. § 846 (1976), and of distributing and possessing with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1). Finding no merit in any of their contentions on appeal, we affirm.

1. Defendants contend that various items found in their apartment and admitted at trial should have been suppressed because they were seized pursuant to a search warrant that was invalid in that it was procured on the basis of material misrepresentations. This issue is foreclosed by reason of our prior ruling in this case in *United States v. Segura*, 663 F.2d 411 (2d Cir. 1981). On the prior appeal,

the government sought to overturn a ruling of the district court suppressing all evidence seized in the apartment of Segura and Colon. The district court had ruled the search warrant valid, but had suppressed all evidence seized in the apartment on the ground that the initial entry of the government agents had been unlawful. The government requested a reversal as to all of the evidence seized, on the ground that the initial entry was necessitated by exigent circumstances, or alternatively a reversal as to some of the evidence, on the ground that it was discovered and seized pursuant to a valid search warrant issued after the initial entry. Notwithstanding that the validity of the warrant was the linchpin of the government's "fallback" position, the defendants never argued that the search warrant was invalid, although they were entitled to make such an argument in support of the suppression order. *United States v. Swarovski*, 557 F.2d 40, 49 (2d Cir. 1977) (citing *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970)), *cert. denied*, 434 U.S. 1045 (1978); *see Smith v. Phillips*, 102 S.Ct. 940, 945 n.6 (1982). Even after we accepted the government's alternative contention by reversing the suppression of the evidence seized after the issuance of the warrant, Segura and Colon did not challenge the validity of the warrant. They moved for rehearing, but asked that we reconsider our ruling allowing use of "the evidence discovered pursuant to the valid search warrant" solely on the ground that the case we had found controlling, *United States v. Agapito*, 620 F.2d 324 (2d Cir.), *cert. denied*, 449 U.S. 834 (1980), had been wrongly decided. (Petition of Segura and Colon for Rehearing, filed November 20, 1981, at 2.) Since Segura and Colon had adequate opportunities on the prior appeal to present their contentions as to the validity of the search warrant, we see no reason not to rule that our prior decision as to that issue is the law of the case. *See McClain v. United Staes*, 676 F.2d 915, 917 (2d Cir. 1982).

Even if the attack on the validity of the warrant were not foreclosed, however, we would reject it for lack of merit. Defendants have pointed to no evidence to suggest that the district court should have found the misstatements in the

affidavit seeking issuance of the search warrant to be deliberate or reckless falsehoods. *See Franks v. Delaware*, 438 U.S. 154, 171-72 (1978). The misstatements alleged were the agent's interpretations of statements made to him, and his interpretation of Segura's use of the term "stuff" as referring to narcotics was consistent with common usage in the trade. *See, e.g., United States v. Beltempo*, 675 F.2d 472, 475 (2d Cir. 1982); *Unied States v. Martino*, 644 F.2d 860, 874 (2d Cir. 1981). The district court's implicit ruling that the variance between statements and interpretations was not material is not clearly erroneous.

2. Segura and Colon also contend that the evidence at trial was insufficient to support their convictons. The evidence included (1) the government agent's observations of the meeting between Segura and Enrique Rivdulla at a restaurant at which neither they nor anyone accompanying them obtained food; Segura's gesture to Colon who then left the restaurant with a bulging pocketbook, entered the automobile of Rivdulla, and emerged moments later with no bulge in the purse; and the arrests minutes later of Rivdulla and his companion with a half kilogram of cocaine; and (2) the items found in the apartment of which Segura and Colon were co-lessees, including one kilogram of cocaine, $56,000 in cash, and a notebook apparently recording transactions with, *inter alios*, "Enrique." Viewing the evidence in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), we conclude that a rational juror could have concluded beyond a reasonable doubt that each defendant was guilty of conspiracy to distribute cocaine and of distribution of, and possession with intent to distribute, cocaine.

The judgments are affirmed.

/S/ JAMES L. OAKES
JAMES L. OAKES

/S/ THOMAS J. MESKILL
THOMAS J. MESKILL

/S/ AMALYA L. KEARSE
AMALYA L. KEARSE
Circuit Judges

Supreme Court of the United States

No. 82-5298

ANDRES SEGURA AND LUZ MARINA COLON, PETITIONERS

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Second Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition.

FEBRUARY 22, 1983

NOV 27 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ANDRES SEGURA and LUZ MARINA COLON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

1. Whether evidence discovered pursuant to a valid, untainted search warrant should be suppressed because police had improperly entered the premises before the warrant was issued to conduct a security check.

2. Whether certain statements in a search warrant affidavit were intentional material misrepresentations that render the warrant invalid.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-5298

ANDRES SEGURA and LUZ MARINA COLON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals on the interlocutory appeal (Pet. App. B) is reported at 663 F.2d 411. The opinion of the court of appeals affirming the convictions (Pet. App. C) is unreported. The opinion of the district court (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1982. The petition for a writ of certiorari was filed on August 27, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the district court's grant of petitioners' suppression motion, the United States took an appeal pursuant to 18 U.S.C. 3731. The court of appeals affirmed in part and reversed in part (Pet. App. B). Petitioners were then tried before a jury in the United States District Court for the Eastern District of New York and were convicted of distributing,

possessing with intent to distribute, and conspiring to distribute cocaine in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner Segura was sentenced to ten years' imprisonment on the conspiracy conviction and to ten years' imprisonment followed by a 15-year special parole term on each of the three substantive counts of which he was convicted, all sentences to run concurrently. Petitioner Colon was sentenced to eight years' imprisonment on the conspiracy conviction and to eight years' imprisonment and a special parole term of 15 years on each of the three substantive counts of which she was convicted, all sentences to run concurrently. The court of appeals affirmed (Pet. App. C).

1. The pertinent facts are set out in the first opinion of the court of appeals (Pet. App. B, 5308-5311) and in the opinion of the district court (Pet. App. A, 2-6, 12-15). Government agents had been keeping petitioners under close surveillance because they were suspected of engaging in cocaine sales. On February 12, 1981, agents observed petitioners transfer a bulky item to Enrique Rivudalla-Vidal and Esther Parra. Shortly thereafter, Rivudalla was arrested in possession of a bag that contained approximately one-half kilogram of cocaine. Rivudalla told the agents that he had received the cocaine from petitioner Segura, that they had originally planned a larger sale and that Segura was to call him later that evening (Pet. App. B, 5309).

At about 6:30 p.m., the agents obtained authorization from an Assistant United States Attorney to arrest petitioners but were advised that a search warrant could not be obtained until the following day. The agents then undertook surveillance of petitioners' apartment building and arrested Segura when he entered the building at about 11:15 p.m. Although Segura denied living in the building, agents took him to his apartment, knocked on the door, and entered the apartment when petitioner Colon opened the door. In addition to Colon, they discovered three

other persons in the apartment. The agents performed a limited security check of the premises before arresting Colon and taking all five individuals to Drug Enforcement Administration (DEA) headquarters. In the course of the security check, the agents discovered a triple beam scale, several jars of lactose and numerous small cellophane bags; these items were left in the apartment, which was secured by two agents who remained on the premises until the search warrant was obtained. When petitioner Colon attempted to bring a shoulder bag with her to DEA headquarters, the bag was searched and a loaded revolver and over $2000 in cash were found (Pet. App. B, 5309-5310).

A search warrant application was presented to a magistrate the next day, and a warrant was issued and executed. Agents discovered 1250 grams of cocaine in an attache case, 58 grams of cocaine in the pocket of a coat, 18 rounds of ammunition for the revolver, over $50,000 in cash, and records of narcotics transactions. The items discovered during the search pursuant to the warrant were seized, together with the other evidence that had been discovered in the course of the security check the previous day.

2. Following a hearing, the district court granted petitioners' motion to suppress all the evidence seized from the apartment (Pet. App. A). The court found that there were no exigent circumstances to justify the warrantless entry into the apartment and hence that the original entry and security check of petitioners' apartment was illegal (Pet. App. A, 18). The court concluded that the search warrant itself was valid (id. at 18-19), but, relying heavily on United States v. Griffin, 502 F.2d 959 (6th Cir.), cert. denied, 419 U.S. 1050 (1974), held that the evidence seized pursuant to the warrant nonetheless had to be suppressed (Pet. App. A, 19-22). The court explained that the evidence would not inevitably have been discovered in the absence

of the illegal entry because petitioner Colon might have destroyed it before the warrant could be executed (id. at 22).

The court of appeals affirmed in part and reversed in part (Pet. App. B). The court agreed that the warrantless entry was illegal (id. at 5311-5315), but it held that the evidence seized pursuant to the valid warrant was admissible (id. at 5315-5317). The court explained that the fact that persons were present in the apartment who might otherwise destroy the evidence was a "prudentially unsound" basis for suppression because it would penalize the officers for the correctness of their belief that an entry was necessary to prevent destruction of the evidence (id. at 5317). The court further held, however, that the evidence actually discovered in the course of the initial entry must be suppressed (id. at 5317-5318).

Petitioners were then tried and convicted, and the court of appeals affirmed their convictions (Pet. App. C). The court rejected their contention that the search warrant was invalid because of material misrepresentations in the affidavit, holding that this contention was foreclosed by the court's earlier decision on the government's pretrial appeal and that, in any event, the district court had correctly concluded that there were no material misstatements in the affidavit that would invalidate the warrant (id. at 1-2). The court also rejected the contention that the evidence was insufficient (id. at 2-3).

ARGUMENT

1. Petitioners contend (Pet. 9-14) that the court of appeals erred in suppressing the evidence discovered pursuant to a valid warrant after agents had illegally entered the apartment without a warrant. They correctly note that the decision below conflicts with United States v. Allard, 634 F.2d 1182 (9th Cir.

1980). There is presently pending before this Court a petition for a writ of certiorari in United States v. Crozier, No. 82-819. 1/ That petition raises several issues, including the same question presented here concerning the admissibility of evidence discovered while executing a valid warrant on premises that had earlier been entered illegally. In our petition in Crozier (at 19-20), we note the conflict between the instant case and Allard, on which the Crozier court relied, and urge the Court to grant certiorari to resolve that conflict. 2/

For the reasons set forth in our petition in Crozier (at 16-19), petitioners' contention that the decision below was erroneous is without merit. The illegal entry did not cause the later discovery of the evidence pursuant to the warrant; hence, that evidence was not a "fruit," but rather was derived from a source independent of any illegality and should not have been suppressed. See, e.g., Wong Sun v. United States, 371 U.S. 471, 481 (1963). As the court of appeals explained (Pet. App. B, 5317), the fact that there were persons present in the apartment does not alter that conclusion. The Fourth Amendment does not protect an individual's right to destroy incriminating evidence during the time it takes to procure a warrant. Thus, the court of appeals correctly ruled that the evidence discovered pursuant to the warrant was admissible. Accord, United States v. Beck, 662 F.2d 527, 530 (8th Cir. 1981); United States v. Kinney, 638 F.2d 941, 945 (6th Cir.), cert. denied, 452 U.S. 918 (1981). United States v. Fitzharris, 633 F.2d 416, 421 (1980), cert.

1/ A copy of our petition in Crozier is being supplied to petitioners.

2/ Petitioners err in asserting that the decision below conflicts with United States v. Griffin. In Griffin, the court refused to apply the "inevitable discovery" doctrine to validate the seizure of evidence actually discovered in the course of the illegal entry. Here, the court of appeals agreed that evidence discovered during the illegal entry should be suppressed (Pet. App. B, 5317-5318).

denied, 451 U.S. 988 (1981). Nonetheless, in light of the need to resolve the conflict in the circuits on this issue, it is appropriate that this petition be granted or, alternatively, held pending the disposition of Crozier. 3/

2. Petitioners also contend (Pet. 14-19) that the warrant itself was not valid because the supporting affidavit contained "material misrepresentations" without which it failed to establish probable cause. This contention is insubstantial and does not warrant review by this Court.

Petitioners' allegations plainly do not justify invalidation of the warrant under Franks v. Delaware, 438 U.S. 154 (1978). As the court of appeals found (Pet. App. C, 2), there is no evidence to suggest that the alleged misstatements were "deliberate or reckless falsehoods." Rather, they were paraphrases by the affiant of statements that in fact were made to him. Rivudalla had told the agent that he believed that petitioner Segura still had the unsold cocaine on him (see Tr. 342-343; Pet. 15). And, as the court of appeals found (Pet. App. C, 2), the agent's interpretation of Segura's use of the phrase "the stuff" to refer to narcotics was a reasonable inference and surely not an intentional misstatement. Thus, the validity of the warrant was correctly upheld by both courts below, and this fact-bound contention does not warrant review by this Court. 4/

3/ Because Crozier presents a second, important issue that we believe also warrants this Court's consideration, the Court may find it preferable to resolve this issue in that case. In addition, because the court of appeals' conclusion that there were no exigent circumstances that justified the warrantless entry here is open to serious question, it is possible that the Court will not find occasion to resolve the conflict if it grants review in this case.

4/ Moreover, as the court of appeals explained (Pet. App. C,2), it was not proper to raise this issue for the first time on the post-trial appeal and the claim was therefore not adequately preserved. In contrast to the situation in United States v. West, 453 F.2d 1351 (3rd Cir. 1972) (see Pet. 19), petitioners are seeking the suppression of the very evidence held admissible on the pretrial appeal, and their challenge is to the validity of the warrant, which was the fundamental premise of the government's argument and the court's decision there. Any (Continued)

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of United States v. Crozier, supra, and disposed of as appropriate in light of the Court's disposition of that case. Alternatively, the petition should be granted, limited to Question 1.

Respectfully submitted.

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NOVEMBER 1982

objection petitioners had to the validity of the warrant should have been put before the court of appeals at that time.

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No. 82-5298

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

ANDRES SEGURA and LUZ MARINA COLON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONERS

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QUESTION PRESENTED

Whether the introduction into evidence of contraband discovered pursuant to a search warrant obtained after a nineteen hour illegal entry, seizure and physical occupation of a dwelling violates the Constitutional requirement that a magistrate must find probable cause and issue a warrant *before* the police violate the privacy of the home.

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OPINIONS BELOW

The opinion of the district court (J.A. 3-16) is not reported. The interlocutory opinion of the Court of Appeals (J.A. 17-27) is reported at 663 F.2d 411. The affirmance by the Court of Appeals (J.A. 30-32) is unpublished but is noted at 697 F.2d 300.

JURISDICTION

The Court of Appeals judgment reversing, in part, the district court's suppression of evidence, was entered on November 6, 1981. The Court of Appeals judgment affirming the convictions was entered on June 29, 1982. The petition for a writ of certiorari was filed on August 27, 1982 and was granted on February 22, 1983, limited to Question 1 presented by the petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Four:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT

1. In the month of January, 1981, members of the New York City Drug Enforcement Task Force, which is composed of New York police officers and agents of the federal Drug Enforcement Administration, received information relating to heavy trafficking in cocaine. From January 26, 1981, until the date of their arrest on February 12, 1981, petitioners Segura and Colon were under virtually constant surveillance by the agents (J.A. 3-4). On February 12, 1981, agents followed petitioners from the apartment in which they resided together to a restaurant in Queens, New York, where they observed Segura and Colon effect what appeared to be the delivery of a bulky item to two individuals named Rivudalla and Parra (J.A. 18). The agents then followed Rivudalla and Parra, and at approximately 5:30 p.m. stopped them for questioning. Upon learning that a paper bag carried by Parra contained a glassine bag of white powder, the agents placed Rivudalla and Parra under arrest. The white powder was eventually determined to be approximately one-half a kilogram of cocaine. Rivudalla told the agents that he had received the cocaine on consignment from Segura earlier that day at the restaurant. Originally, Rivudalla was to receive one kilogram of cocaine from Segura, but that plan was reduced to a half of a kilogram because Rivudalla was not sure that he could dispose of an entire kilogram. Finally, Rivudalla told the agents that Segura was to telephone him at approximately 10 p.m. that day (February 12) to discuss Rivudalla's success in disposing of the consigned cocaine[1] (J.A. 10,18).

[1]Because Rivudalla was unavailable at the time of the trial, the conversation between Rivudalla and the agents was not disclosed to the jury.

At approximately 6:30 p.m., Agent Palumbo, the agent in charge of the Task Force, telephoned the United States Attorney's Office for the Eastern District of New York, and requested authority to arrest Segura and Colon and to search their apartment[2] (J.A. 10,18). An Assistant United States Attorney told Agent Palumbo that a search warrant could not be obtained until the following morning because the magistrate "could not be found" (Tr. 154), and that the agents should attempt to arrest Segura and Colon and go to petitioners' dwelling to "secure the premises outside the premises" (Tr. 446-447). The agents received no authorization from the prosecutor to enter petitioners' apartment (J.A. 10,18).

At 7:30 p.m., three agents, led by Agent Shea, went to petitioners' apartment house to set up surveillance. Before going there, Shea and the others had been told by Palumbo, their superior, *not* to enter the suspect apartment (Tr. 295). The agents took up positions on the fire stairs near the door of the apartment, 3D, from where they could see anyone who entered or left the apartment (J.A. 10,18). While there, the agents had no reason to believe that anyone was inside the apartment. No lights were visible underneath the door of the apartment. Agent Shea pressed his ear to the apartment door, but heard no sounds from within. Segura's car was not observed parked in the vicinity. For nearly three hours no one entered or left the apartment as the agents watched from the fire stairs. At about 10:30 p.m. the agents left the fire stairs to set up surveillance outside the building (J.A. 10, 18-19).

At approximately 11:15 p.m. Segura entered the apartment building alone. The agents followed him into the

[2]Based upon their previous surveillance, the agents knew that Segura and Colon were co-lessees of the apartment.

vestibule in the lobby of the building and arrested him. The entry of Segura into the building and the arrest of him by the agents could not be seen from petitioners' apartment, which was located on the third floor rear of the building (J.A. 10,19). Agent Shea told Segura they were going to "go up to the apartment". Segura denied living in the building, but the agents handcuffed him and forcibly took him to Apartment 3D. At the apartment door, Agent Shea drew his gun but hid it behind his leg (Tr. 336, 402-403). Holding Segura in front of him, Shea knocked on the door, which was answered by a woman unknown to Shea but later identified as petitioner Colon. Agent Shea, without more, walked into the apartment with Segura in custody. He was then followed by two other agents, and five minutes later, by Palumbo. Neither Shea nor any other agent had an arrest or search warrant. Nor did any of the officers ask for or receive consent to enter the apartment (J.A. 10-11, 19).

Once inside, the agents discovered three other persons present in addition to Colon. Two of the agents immediately conducted a "security check" to ensure that no one else was present. The "security check" consisted of the agents walking through each room of the apartment and looking into each closet. During this inspection they discovered a triple-beam scale and several jars of lactose in plain view[3] on a bedroom table and numerous small cellophane bags in a bedroom closet (J.A. 19; Tr. 367).

Upon the arrival of Palumbo, Colon and the three other occupants of the apartment were placed under arrest and were shortly thereafter removed, along with Segura, to Drug

[3]The apartment consisted of a living room, kitchen and two bedrooms. The door to the apartment opened onto the living room. These articles were therefore not visible to the agents from the entry way of the dwelling (Tr. 405).

Enforcement Administration headquarters.[4] As Colon was preparing to depart, she sought to take her shoulder bag with her. Before permitting this, one of the agents searched the bag and discovered a loaded .38 caliber revolver and approximately $2,000 in cash (J.A. 11,19).

At least two agents remained inside the apartment at all times until a search warrant was issued. Because of "administrative delays" and the inability "to get secretarial services", application for the warrant was not presented to a magistrate until approximately 5 p.m. the following day, a period of eighteen hours after the initial unauthorized entry. The application consisted of a two page affidavit prepared by Agent Palumbo, which contained factual misrepresentations in that it omitted mention of the entry by the agents into petitioners' apartment or the observations of the agents while in the apartment (J.A. 28-29). A search warrant was issued at about 6 p.m., some nineteen hours after the initial entry. In the search pursuant to the warrant agents discovered 1,250 grams of cocaine in an attache case, 58 grams of cocaine in the pocket of a coat in the bedroom closet, 18 rounds of .38 caliber ammunition in an eyeglass case, more than $50,000 in cash in a box, and records of purported narcotics transactior on a closet shelf. These items, as well as the scale, lactose and baggies found by the agents the night before, were removed from the apartment and held by the agents to be used as evidence against Segura and Colon (J.A. 11, 18-19).

2. After an evidentiary hearing, the district court granted petitioners' motion to suppress the evidence in its entirety (J.A. 3-16). The district court rested its decision on two

[4]The charges against the three other occupants were subsequently dismissed on motion of the United States Attorney.

grounds. First, it found that the initial warrantless entry could not be justified on the basis of any exceptions to the warrant requirement of the Fourth Amendment. Second, it found that the illegality of the initial entry and arrest of Colon, coupled with the unreasonableness of the delay in securing a search warrant, required the suppression of all the evidence seized from petitioners' dwelling. "To validate the search of the apartment under the circumstances of this case would permit Government agents to take advantage of their own wrong" (J.A. 15-16).

3. On appeal by the government to the Court of Appeals, the district court's order was affirmed in part and reversed in part. The Court of Appeals held that the entry into petitioners' dwelling was not justified, and that all items discovered prior to the issuance of the search warrant must be suppressed. However, the court held that the evidence discovered pursuant to the search warrant should not have been suppressed, and could be introduced into evidence at petitioners' trial (J.A. 17-27).

4. The petitioners then proceeded to trial in the district court and were convicted of narcotics offenses.

5. The Court of Appeals affirmed the convictions, rejecting petitioners' contentions that the search warrant was invalid because it was procured on the basis of material misrepresentations and that the convictions were based on insufficient evidence.

SUMMARY OF ARGUMENT

This case raises the important question of whether police may flagrantly and without a warrant enter into and occupy a home, seize evidence, and then cure this misconduct by

obtaining a search warrant almost one full day after the initial illegal entry.

It is petitioners' argument that (1) the initial warrantless entry by the police into their home and the seizure and occupation of it by the police without authorization violated their Constitutional right to be free from unreasonable searches and seizures; (2) the evidence which was seized from their home is irretrievably tainted and that taint cannot be cured by a search warrant obtained almost one full day later but before the evidence was inventoried and removed; and (3) the misconduct by the government officials was so flagrant and abusive that the policies of the exclusionary rule would be served by its application in the instant case in that the police would be deterred from this specific type of misconduct in the future without any hampering of their ability to conduct appropriate criminal investigations.

I

A. The historical context within which the Fourth Amendment was adopted and in which it has been applied by this Court has always shown a special concern for the individual's home as a sanctified place where there is the highest possible expectation of privacy. *See Payton v. New York*, 445 U.S. 573 (1980), and cases cited therein.

It is equally clear that, absent exigent circumstances, the police may not enter a home without first obtaining a warrant from a neutral and detached magistrate. *Johnson v. United States*, 333 U.S. 10 (1948).

The problem in the instant case is that the police acted before they made application to a magistrate and improperly intruded upon and occupied petitioners' home and thereafter attempted to cure this illegality by belatedly obtaining a

warrant. Petitioners argue that such action should be disallowed because it would permit the police to engage in Fourth Amendment violations on whim and then abandon the search or continue it depending not on the law but on whether the search proved successful or not.

B. Petitioner Colon was especially aggrieved by the misconduct in this case in that not only was her home subjected to an unreasonable search and seizure, but her person was violated by the illegal arrest of her at her home without a search or arrest warrant. *Payton v. New York, supra.*

C. Both the district court and the Court of Appeals below properly held that the illegal entry, occupation and seizure in the instant case were not justified by the existence of exigent circumstances. This holding was clearly correct and should not be disturbed by this Court. In sum, the police had no reason to believe that anyone was in the home at the time of the illegal entry nor was there reason to believe that if there were persons on the premises such persons were aware of petitioner Segura's arrest in the lobby of the apartment building so that they might either escape, destroy evidence or pose a threat to the officers or the public.

Indeed, this case does not present any exceptional circumstances which would justify the police misconduct in illegally occupying petitioners' home. The police were advised both by their superior officer, Agent Palumbo, and by an Assistant United States Attorney that they should *not* enter the apartment and they certainly received no consent from any of the occupants to enter. No emergency was occurring on the premises and the police cannot and do not claim that they were in "hot pursuit" of a suspect in entering the home. Finally, there is no claim of imminent removal and/or destruction of evidence. *Vale v. Louisiana,* 399 U.S. 30 (1970).

II

A. The holding of the lower court that the warrantless physical entry and occupation of petitioners' home for almost one full day did not constitute a "seizure" of the contents of the home should not be allowed to stand because it would be contrary to the important policy objectives underlying the Warrant Clause of the Fourth Amendment. Further, it is illogical for the government to argue that even though there was an illegal entry and occupation, a seizure did not occur until the arrival of the warrant. The entire apartment was occupied by the police who sealed off the premises and remained there for nineteen hours free to look around to their hearts' content. If this does not constitute a "seizure" it is difficult to comprehend what would.

Given the facts surrounding the police take-over of petitioners' home, the lack of authorization, and the exorbitant amount of time the police spent in the home, it is argued that the seizure of the home constituted a *per se* seizure of all its contents.

B. Because the contraband seized was primary rather than derivative evidence, the police misconduct cannot be cured by applying the doctrines of "attenuation" and "independent source". *Wong Sun v. United States*, 371 U.S. 471 (1963); *Silverthorne Lumber Co., Inc. v. United States*, 251 U.S. 385 (1920).

This is not a case where the long-delayed, *ex post facto*, obtaining of a search warrant could, or did, attenuate the illegality of the initial seizure and continuous occupation. In addition, it is not logical for the government to claim that the warrant constituted an "independent source" for the seizure of the contraband. It is clear that once the police took control of the home and its contents, no "independent source" could

dilute or affect their illegal course of conduct. Thus, no exception to the exclusionary rule exists in the instant case and the rule should be applied to suppress the illegally seized evidence.

III

A. The purpose of the exclusionary rule is the deterrence of police activity that violates the Fourth Amendment. *United States v. Calandra,* 414 U.S. 338 (1974). The objectives of the rule would be achieved by its application herein, particularly in light of the flagrant nature of the official misconduct.

When, as here, one's home was the subject of the illegal entry and occupation, the illegality occurred at night, the police received no authorization to enter from either the United States Attorney or the agent in charge, exigent circumstances were totally lacking, and the illegal occupation lasted for nineteen hours notwithstanding the availability of magistrates and judges in New York City who could readily issue a search warrant, then the exclusionary rule should be applied and the evidence suppressed.

B. The "good-faith" exception to the exclusionary rule does not apply under the facts of this case. Said exception is applicable only when the Fourth Amendment violation is of a technical nature and does not involve deliberate or flagrant activity by law enforcement officials. *Michigan v. Tucker,* 417 U.S. 433 (1974).

C. If this Court should decide that the impounding of a home pending the securing of a search warrant is Constitutionally acceptable, then such doctrine should not be applied in the instant case because the flagrant actions of the police went far beyond the mere impounding of the dwelling.

In particular, the length of time the police occupied the home — nineteen hours — and the fact that the police remained inside the apartment even after all possibility that the evidence would disappear was nonexistent, militate against adopting an "impoundment alternative" on the facts of this case. *See* 2 LaFave, *Search & Seizure, A Treatise on the Fourth Amendment,* sec. 6.5(c) (1978), and cases cited therein.

ARGUMENT

I.

THE ENTRY INTO AND SEIZURE BY DRUG ENFORCEMENT AGENTS OF PETITIONERS' DWELLING WITHOUT A WARRANT AND IN THE ABSENCE OF EXIGENT CIRCUMSTANCES VIOLATED PETITIONERS' FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES

A. Belief by the Police that Contraband is Within a Home Does Not Allow Them to Make a Warrantless Entry and Seizure

At the time that the agents entered the home of the petitioners, they possessed neither a search nor an arrest warrant. The entry therefore violated the right of the petitioners "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . ." U.S. Const., Amend. IV.

The prohibition against unreasonable searches and seizures, embodied in the Fourth Amendment, is a bulwark

against arbitrary governmental interference in our daily lives. It is the matrix upon which our free country was founded.

In pre-Revolutionary Massachusetts, James Otis, representing Boston merchants fighting the issuance of hated writs of assistance, eloquently attacked encroachments on "one of the most essential branches of English liberty [which] is the freedom of one's house. A man's house is his castle. . ." J. Quincy *Reports of Cases Argued in the Superior Court of Judicature of the Province of Massachusetts Bay Between 1761 and 1772*, at 51 (1865). Young John Adams heard Otis in debate and dated the start of the revolution from Otis' impassioned defense of the sanctity of the home. "Then and there," Adams wrote, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." 2 *Legal Papers of John Adams* 142 (L. Wroth and H. Zobel eds. 1965).

The Founding Fathers enshrined the sanctity of the home from arbitrary governmental intrusion in the Fourth Amendment. For over two hundred years its assurances have been the envy of those who would live as free men and women.

> "The security of one's privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society. . . The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949)

The purpose of the Fourth Amendment is to protect the privacy of the individual. Where a person has a reasonable expectation of privacy, the government cannot unreasonably intrude. Of the various places and things in which an individual is accorded a Constitutionally protected right of privacy - his papers, his automobile, his office, his hotel room - none attains the stature of his home. It is quite simply unique in Fourth Amendment jurisprudence. The home is specifically set forth in the Amendment as a place where one may be secure and is at the heart of what the Founding Fathers were trying to protect.

It has been said that at the very core of the Fourth Amendment stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961), citing *Entick v. Carrington*, 19 Howell's State Trials 1029, 1066.

This Court has accordingly always afforded the sanctity of private dwellings the most stringent Fourth Amendment protection. *United States v. Martinez-Fuerte*, 428 U.S. 543, 562 (1976). *See also Boyd v. United States*, 116 U.S. 66, 630 (1886); *United States v. Johnson*, ____ U.S. ____, 102 S.Ct. 2579, 2589 (1982).

This Court's most recent enunciation of the preeminent position of the home in the hierarchy of values protected by the Fourth Amendment occurred in *Payton v. New York:*

> "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home. . .In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the

house." *Payton v. New York*, 445 U.S. 573, 590-91 (1980).

In considering the issues involved in this case, and in balancing the competing individual and governmental interests, this Court must not lose sight of the fact that it was, indeed, the petitioner's *home*, their most sacred zone of privacy, that was violated by the agents' entry and occupation for nineteen hours. No more egregious a desecration of petitioners' Fourth Amendment rights is imaginable.

Petitioners do not contend that the fact that one's home is treated so deferentially under the Fourth Amendment means that it may never be entered by law enforcement officials. When a magistrate signs a search warrant allowing the police to enter one's dwelling, the Fourth Amendment requirements have been met; an impartial magistrate - not a policeman - in a position to weigh the rights of the individual against the legitimate interest of the state has determined that there is probable cause to believe that contraband may be found in the suspect's home. In the instant case, the agents believed, on the basis of their prior observations that day, and their conversation with Rivudalla, that there was cocaine in petitioners' apartment.

The suspicions of the agents were proven to be correct by the actual existence of narcotics in the apartment. But the fact that the police were accurate in their untested beliefs cannot be used as a basis for holding that their entry into and seizure of petitioners' home passes Constitutional muster. It does not.

Over fifty years ago this Court held that "[b]elief, however, well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing

probable cause." *Agnello v. United States*, 269 U.S. 20, 32-33 (1925). *See also Jones v. United States*, 357 U.S. 493, 498 (1958).

Cases abound in which police officers have even a higher degree of suspicion than in the instant case that contraband may be found in a home, yet this Court has abided by its holding that, absent exigent circumstances, the police may not enter a home without the prior approval of a magistrate. For example, in *Johnson v. United States*, 333 U.S. 10 (1948), trained narcotics investigators detected the distinctive odor of opium emanating from a hotel room. Fearful that the evidence might be destroyed or that the occupants of the room might leave before they could secure a search warrant, the police entered the room, seized the opium and arrested the occupants. This Court held that the actions of the police were unlawful, notwithstanding their certainty, based on their expertise in the field of narcotics, that there was opium in the room. In its decision, *per* Justice Jackson, the Court eloquently stated the reason for the Warrant Clause:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. *Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's home secure only in the discretion of police officers.*" (Emphasis supplied.) 333 U.S. at 13-14.

Similarly, where police heard the sound of adding machines in a dwelling suspected of being a gambling den, they were not justified in making a warrantless entry into the premises. *McDonald v. United States,* 335 U.S. 451 (1948).

Before illegally entering petitioners' apartment, the agents made inquiries of the United States Attorney's Office about obtaining a search warrant. The United States Attorney left no doubt in the mind of Agent Palumbo that a search warrant was necessary before entering the petitioners' apartment. Nonetheless, the police did not actually make application to a magistrate for a warrant until eighteen hours after they illegally entered, seized and continuously occupied the premises. Finally, nineteen hours after seizure of the apartment had been effected, the police obtained the warrant permitting them to enter. Their conduct makes a mockery of the Fourth Amendment. The issuance of the warrant almost a full day and night after the police seized the apartment cannot excuse or nullify the unconstitutional police behavior, and leaves us where Justice Jackson determined we should not be: "in the discretion of police officers".

The purpose of the Warrant Clause is to put the imprimatur of the law upon the government's actions. It is to allow the policeman to say to the suspect: "I am going to enter your house whether you like it or not, but it is not my decision alone. I have the authority of the law in the form of this warrant which I show to you." No such warrant was displayed to the petitioners or to the other three people arrested at their apartment. The agents simply walked in and seized a home, with brute force, under no color or claim of legality.

The government's argument that the police can retroactively obtain a warrant to legitimize their illegal entry and

continued seizure misses the central point of the Warrant Clause's protection: the review by an independent disinterested magistrate must take place *before*, not after, the damage is done.

The obtaining of a warrant *before* the police enter one's dwelling is *not* a ministerial act. "We are not dealing with formalities. The presence of a search warrant serves a high function". *McDonald, supra* at 455. *See also, Payton, supra* at 591 ("Absent exigent circumstances, that threshold [entrance to the house] may not reasonably be crossed without a warrant."); *Steagald v. United States*, ____ U.S. ____ , 101 S.Ct. 1642, 1649 (1981) ("[There is a] constitutional requirement that in the absence of exigent circumstances a warrant must be obtained for a home arrest or a search of the home for objects. . .[I]n such cases the participation of a detached magistrate in the probable cause determination is an essential element of a reasonable search and seizure. . .").

B. The Fourth Amendment Prohibits the Police From Entering a Home Without a Warrant for the Purpose of Making an Arrest.

It is of interest that, even under the common law, the entry to arrest Colon would be illegal. At common law, a constable could only enter a suspect's home to make an arrest if (1) the arrest was for a felony; (2) the constable announced his presence and demanded admission; (3) the entry occurred during daylight hours; and (4) the constable had reasonable grounds to believe that the persons suspected of the crime was present in the house at the time of the entry. *Payton, supra* at 617 (White, J., dissenting).

During the entire time that the agents had petitioners' apartment under surveillance, they had no idea that Colon was home. They had seen no lights, heard no sounds, even with an ear pressed against the apartment door, and had seen no person entering or leaving. Even after the arrival of Segura, the agents had no reason to believe that anyone was in the apartment (J.A. 22). Thus, in the instant case, criteria (3) and (4) for common law home arrests are absent. The entry occurred at nighttime (11:15 p.m.), and the agents had no reasonable belief that Colon was at home (J.A. 12).

Since *Payton,* of course, it is clear that absent exigent circumstances, a search or arrest warrant must be obtained in all circumstances before the police may enter a dwelling to arrest an individual. *Payton, supra; Steagald, supra; United States v. Reed,* 572 F.2d 412 (2nd Cir. 1978), *cert. den.,* 439 U.S. 913 (1978).

Therefore the illegal entry and arrest by the agents violated Colon's constitutional guarantees in two respects: her right to be secure in her *person* from unreasonable seizures, and her right to be free in her *home* from unreasonable searches and seizures.

C. No Exigent Circumstances Were Established Which Would Justify the Warrantless Entry, Occupation and Seizure

The holdings of this Court make clear that barring an emergency, consent, hot pursuit of a suspect, or exigent circumstances, the police may not enter an individual's dwelling without a search warrant or an arrest warrant. *Coolidge v. New Hampshire,* 403 U.S. 443 (1971); *Johnson v. United States, supra; McDonald v. United*

States, supra; United States v. Santana, 427 U.S. 38 (1976).

At the district court and Court of Appeals, the government unsuccessfully attempted to justify the warrantless entry into petitioners' dwelling on the basis of exigent circumstances. The government contended that if the agents had not entered the apartment and arrested Colon, she would have been free to destroy any incriminating evidence or contraband during the time between Segura's arrest and the issuance of a valid warrant. (J.A. 12).

Both lower courts examined the evidence in light of *United States v. Agapito,* 620 F.2d 324 (2nd Cir. 1980), *cert. den.,* 449 U.S. 834 (1980), which set forth the preconditions necessary to justify a warrantless entry into premises, following an arrest outside, for a security check to prevent the destruction of evidence:

> "[T]he arresting officers must have (1) a reasonable belief that third persons are inside, and (2) a reasonable belief that the third persons are aware of the arrest outside the premises so that they might destroy evidence, escape or jeopardize the safety of the officers or the public." 620 F.2d at 336 n. 18.

Both courts found the police failed to meet either criterion. Specifically, the courts found that the agents were unaware of Colon's presence in the apartment until they entered, and in the words of the district court, "[e]ven if Segura's arrival alone made it reasonable to suspect that Colon was in 3D, there was no reason to believe that anyone in the apartment *knew of Segura's arrest and was therefore about to destroy evidence.* The arrest took place in the lobby of the apartment building, two floors below the apartment. The arrest could not have been observed from 3D, and there was no evidence that anyone saw the arrest and reported it to the inhabitants

of 3D." (Emphasis supplied.) (J.A. 12, 22). The district court noted that there was "no flushing of the toilet, scurrying of feet, nor slamming of doors in agents' faces such as would indicate the imminent destruction of evidence." (J.A. 11).

The determination by both the district court and the Court of Appeals that there were no exigent circumstances is clearly correct, and fully supported by the record, thus obviating the need for review by this Court. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *United States v. Ceccolini*, 435 U.S. 268, 274 (1978).

However, should the Court choose to review the question of exigent circumstances, it is submitted that *Vale v. Louisiana*, 399 U.S. 30 (1970), is dispositive of the matter at hand. *Vale* presented a fact pattern much more exigent than that of the instant case, but nevertheless resulted in a similar finding of no exigent circumstances. In *Vale*, the police went to the suspect's house to execute a valid warrant for his arrest. While surveilling the house the police observed the suspect hand over drugs to a person just outside the suspect's house. When the suspect saw the police, he attempted to run back into his house, but was caught by the police in hot pursuit before he reached the premises. The police thereupon entered the suspect's house and found narcotics. This Court held both the entry into the suspect's house and the subsequent search to be illegal, stating that neither the entry nor the search were incident to the suspect's arrest, that there were no exigent circumstances, and that the search cannot be justified solely because narcotics, which are easily destroyed, are involved.

The Court stated that there must be an "exceptional situation" to justify a warrantless entry and search of a

dwelling. The Court identified five such situations: (1) the consent of an occupant; (2) an emergency such as a fire or a violent crime occurring in the premises; (3) the "hot pursuit" of a suspect into the premises; (4) goods in the process of destruction; and (5) goods about to be removed from the jurisdiction. Since the facts in *Vale* met none of the "exceptional situations", the Court declined to "hold that an arrest on the street can provide its own 'exigent circumstances' so as to justify a warrantless search of the arrestee's house." 399 U.S. at 35. The Court so held even though the arrest occurred in a spot readily visible to anyone in the house. *Id.* at 39 (Black, J., dissenting).

Similarly, the facts in the instant case do not support a finding of an "exceptional situation", as both courts below quite properly found.

Quite apart from the issue of claimed exigent circumstances, a comparison of the facts of *Vale* with the instant case is instructive. No doubt the government will make much of the fact that in *Vale,* as opposed to the instant case, the police made an immediate search of the dwelling and removed the contraband that they found, without applying for a search warrant. But in both cases, the police had probable cause to believe that drugs were in the suspect's home, based on their observations on the street. Surely, a magistrate would have issued a search warrant based upon the facts in the *Vale* case.[5] In both cases, the suspect was arrested outside his dwelling and forced to accompany the police inside. In reality, the Fourth Amendment violation in *Vale,* resulting in the suppression of the seized evidence, is less severe than that in the instant case.

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[5]Misapplication of the "independent source" exception to the exclusionary rule would result in an overruling of *Vale.* See: section IIB *infra* at 29 *et seq.*

Here, the agents not only entered unlawfully, but effected lawless arrests of the occupants of the apartment. More importantly, in the instant case the agents continuously violated the petitioners' most sacred zone of privacy - their home - for nineteen hours. The immediate, warrantless removal of the contraband found in petitioners' apartment would have resulted in a less repugnant violation of their Fourth Amendment rights than an occupation of their home, with all the incursions on privacy that that entails. The government's position that this Court should take a *less* stringently disapproving posture in the instant case than what was taken in *Vale* is clearly untenable.

II.

AN AFFIRMANCE OF THE LOWER COURT HOLDING THAT THE EVIDENCE WAS PURGED OF ITS ILLEGAL TAINT MERELY BECAUSE A SEARCH WARRANT WAS OBTAINED BEFORE THE EVIDENCE WAS INVENTORIED OR REMOVED WOULD RENDER THE WARRANT CLAUSE OF THE FOURTH AMENDMENT MEANINGLESS.

A. The Entry Into and Occupation by the Agents of Petitioners' Dwelling for Nineteen Hours Resulted in a *De Facto* Seizure of the Contents of the Home.

After illegally forcing their way into petitioners' apartment, the agents illegally arrested and removed all of the occupants, and then occupied the home for a continuous period of nineteen hours until a search warrant arrived.

Other than making a "security check" by walking through the apartment and looking in all of the closets, the agents testified that they did not conduct a full-fledged search for contraband until the warrant was obtained. Only then, according to their testimony, did they discover the contraband, inventory it, and thereafter remove it from the dwelling.

The Court of Appeals, Second Circuit, held that since the evidence was "discovered" pursuant to the issuance of a valid search warrant, it should not be suppressed (J.A. 26). In so finding, the lower court relied solely on a prior Second Circuit case, *United States v. Agapito, supra.* In *Agapito,* the police illegally entered an empty hotel room and remained there for twenty-four hours awaiting a warrant, after which they opened a suitcase and discovered contraband. In a one paragraph discussion, the *Agapito* court found that although the suitcase had been "seized", it was not searched until the warrant arrived and therefore the contents were admissible in evidence. *Agapito, supra,* 620 F.2d at 338.

It is clear that the Court of Appeals did not carefully consider the issue of "seizure" in either *Agapito* or the instant case. If the lower court can be taken at its word it seems to be suggesting that there is a distinction as a *matter of law* between illegal seizures and illegal searches under the Fourth Amendment. The court clearly stated in *Agapito* that the suitcase was seized *before* any search warrant was obtained. No one has ever argued that the Fourth Amendment prohibition against "unreasonable searches and seizures" applies only to searches. If this Court were to adopt the Second Circuit's view it would have to make such a distinction. It is clear that the Fourth Amendment applies equally to illegal searches *and seizures.* In fact, the

question before this Court, and it should have considered so by the Court of Appeals, is what constitutes a seizure. By any reasonable standard the police, when they occupied the home, were in possession of all of the contents of petitioners' home. It is beyond dispute that the police would not have permitted any of the contents of the apartment to be removed while they occupied it for nineteen hours while awaiting the warrant. Thus the entire contents of the home were under the control and custody of the police.

Certainly, unlawful entry and occupation of a person's home without color of law is precisely the behavior to which the Fourth Amendment is addressed. As this Court has stated, "*physical entry* of the home is the chief evil against which the wording of the Fourth Amendment is directed." (Emphasis supplied.) *United States v. United States District Court,* 407 U.S. 297, 313 (1972). It is the physical presence of the police in the home that is essentially offensive; whether or not the police open a drawer is quite secondary. The fact that the police not only entered unlawfully but lingered for nineteen hours makes the behavior truly repugnant. This Court has never countenanced the type of profoundly offensive police behavior displayed here, and to do so now would sadly diminish the guarantees of the Bill of Rights that we all enjoy.

The Sixth Circuit has reached a decision on the question at hand squarely at odds with *Agapito* and the Second Circuit's decision in the instant case. In *United States v. Griffin,* 502 F.2d 959 (6th Cir. 1974), *cert. den.,* 419 U.S. 1050 (1974), the police had probable cause to search a dwelling, and were already in the process of applying for a search warrant when the entry took place. The police knocked on the door of the dwelling, and when no one answered, went inside, waited four hours for the arrival of the warrant, and

then searched the premises. The Court of Appeals upheld the suppression of the evidence seized from the premises, holding that ". . .police who believe they have probable cause to search cannot enter a home without a warrant merely because they plan subsequently to get one. . .[A]ny other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment." *Griffin, supra* at 961. The *Griffin* case involves less of an invasion of privacy than the facts in the instant case. In *Griffin,* the police officer was actually in the process of obtaining a search warrant at the time of the illegal entry, the entry occurred during the daytime, and the impoundment of the dwelling lasted only four hours. In the instant case, application for a warrant was not made to a magistrate until eighteen hours after the illegal entry, the entry occurred at nighttime, and the police occupied the petitioners' dwelling for nineteen hours.

The Court of Appeals for the Ninth Circuit likewise was unable to distinguish between the seizure and occupation of a hotel room by the police and the detailed search for and seizure of specific evidence after a search warrant arrived two hours later. The court held ". . .that where a defendant establishes that the government illegally 'secured' and thereby seized evidence, and that seizure continues while the government procures a search warrant", all evidence seized during the execution of the warrant must be suppressed. *United States v. Allard,* 634 F.2d 1182, 1187 (9th Cir. 1980). *See also, United States v. Crozier,* 674 F.2d 1293 (9th Cir. 1982) (where the police secured a dwelling for six hours before the search warrant arrived, suppression of evidence was granted on the authority of *Allard, supra.*)

In fact, the majority of courts ruling on this issue have refused to separate the initial illegality of the entry and

occupation of the home from the later seizure of contraband under a presumably valid warrant. The California Supreme Court straightforwardly rejected the kind of distinctions being urged on the Court in the instant case:

> "Analytically this case can be regarded simply as involving a de facto, inchoate seizure of the person and property of [the defendant] the moment the police began the illegal occupation. Thereafter the obtaining of the warrant could no more operate to disinfect this conduct than if the police had actually seized the individual items sought to be suppressed prior to acquisition of the warrant." *People v. Shuey,* 13 Cal. 3d 835, 120 Cal. Rptr. 83, 533 P.2d 211 (1975).

Similarly, in *State v. Bean,* 89 Wash.2d 467, 572 P.2d 1102 (Wash. 1978), the Supreme Court of Washington held that "the initial entry into the house was wrongful and a subsequently obtained search warrant was not curative of the original illegal entry." 572 P.2d at 1105.

The Supreme Court of Oregon reached the same conclusion in a case where there was a mere three-and-a-half hour gap between the illegal entry of the police and the obtaining of a warrant. The Court held that the subsequent securing of a search warrant does not affect the validity of the original warrantless entry. *State v. Matsen,* 287 Or. 581, 601 P.2d 784 (Ore. 1979).

A Florida appellate court considered a case with a fact situation similar to the instant one. A defendant was arrested outside his home and was forced to allow the police to enter the dwelling. After a three hour wait, a search warrant was obtained, the police searched the premises, and narcotics were found. It was held that the subsequent warrant did not excuse the illegal initial entry, and the contraband discovered during the post-warrant search must be suppressed. *State v. Ramos,* 405 So.2d 1001 (Fla. 1981).

The Hawaii case *State v. Dorson*, 615 P.2d 740 (Haw. 1980), is notable not only for its holding which supports the contention of the petitioners in the instant case, but also for the analysis employed therein. In *Dorson*, the police entered the dwelling and made a security "walk-through" but did not search the premises. The police agreed with the occupants of the dwelling that, while awaiting a search warrant, the police would depart but would watch the house and its occupants through a window. Anybody who wanted to leave could do so after being subjected to a frisk. Despite the comparative "peacefulness" of the entry and the attenuated nature of the impoundment, the court held that the actions of the police in sealing the premises and of curtailing the occupants' freedom of movement within the house constituted a seizure that could not be cured by the subsequent issuance of a warrant. In suppressing the evidence, the Court eloquently stated the rationale for prohibiting such police action and the dire consequences that would flow from affirming such practices:

> "What the State proposes would necessarily contemplate that any time the police believe they have probable cause to search, however weak the foundation for their belief may turn out to be, they may with impunity intrude upon the privacy of a person's home, so long as they are in the process of applying for a search warrant. And it would make no difference that a judge might later deny their application. To justify such a procedure, it would have to be presumed that where the police believe they have probable cause, the judge reviewing their application will also find probable cause. This obviously, would not necessarily be the case. The potential for mischief and grave injustice is clearly evident and such a practice is not sanctioned by the Fourth Amendment. The seige and immobilization of the house and its occupants which lasted for a period of some seven hours before the search warrant arrived was patently inexcusable." *State v. Dorson*, supra at 740.

The court thus engaged in a uniform analysis found in all cases in which the police enter and occupy a dwelling in the hope and expectation a warrant will eventually issue: the police have made a decision, prior to violating the privacy of the home, that probable cause existed for a search. If they are correct, the magistrate will simply issue a warrant, a search will be conducted, and a court may, as the Second Circuit did in the instant case, choose to disregard the Constitutional infirmities of the police behavior. But what happens if the magistrate disagrees with the police, fails to find probable cause and refuses to issue a warrant? Do the police merely apologize to the occupants of the dwelling for police-state tactics and sheepishly depart? Trespass and false arrest actions against officers who make unlawful searches and seizures "are mainly illusory remedies." *Mapp v. Ohio*, 367 U.S. 643, 670 (1961) (Douglas, J., concurring). Every reason which was advanced by this Court in determining that the exclusionary rule was necessary to make real the safeguards of the Fourth Amendment pertain to the instant case.

An additional point must be made of the particular facts of the instant case, in contradistinction to the fact situations that obtain in *every* pre-warrant impoundment case save for *Agapito, supra,* both those holding for and against petitioners' contention in the instant case: in all cases, save for *Agapito, supra,* the police occupied the home substantially less than nineteen hours. Even if the Court decides that it is possible to seize the home and not seize its contents, it does not follow that every such "seizure" of every home no matter what the circumstances will not at some point become a seizure sufficient to invoke the Constitutional protection of the Fourth Amendment. A nineteen hour occupation of a home might well be considered a *per se* seizure of the

contents of the dwelling that an after-acquired warrant cannot cure, leaving aside what decision might be reached if a shorter time period is involved.

B. The Doctrines of "Attenuation" and "Independent Source" Cannot be Invoked Because the Contraband Seized Was Primary Rather Than Derivative Evidence.

The courts holding against the petitioners' position have misapplied the doctrines of "attenuation" and "independent source" to pre-warrant seizure situations.

The attenuation doctrine was first set forth in *Wong Sun v. United States*, 371 U.S. 471 (1963). There this Court examined fully the "fruit of the poisonous tree" doctrine earlier enunciated in *Nardone v. United States*, 308 U.S. 338 (1939), *i.e.*, ". . .knowledge gained by the government's own wrong cannot be used by it simply because it is used derivatively."

In police work, perhaps even more than in other areas of life, one fact leads to another: "A" leads the police to "B" which leads to "C", etc. In *Wong Sun*, the Court wrestled with the question of whether given the illegality of "A", derivative evidence "B", "C", etc., should also be suppressed. *Wong Sun* rejected a "but-for" rule that evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Instead, *Wong Sun* enunciated the following test for the admissibility of derivative evidence under the exclusionary rule:

> "[W]hether granting establishment of the primary illegality, the evidence to which instant objection is

made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." (Citation omitted) *Wong Sun, supra* at 487-88.

In *Wong Sun,* defendant Toy made statements to federal agents and the statements were held inadmissible against him. The statements led the agents to defendant Yee and at Yee's home the agents found narcotics which were introduced at trial against Toy. Toy and Yee in turn led the agents to Wong Sun. In reversing Toy's conviction this Court held that the narcotics discovered at Yee's home must be excluded just as Toy's statements which led to that discovery. Using the same test, the Court further held that Wong Sun's confession was not tainted by his illegal arrest, since he had been released on his own recognizance after a lawful arraignment and had returned to the police station voluntarily several days later to make the statement. His confession therefore had been come at by means sufficiently distinguished and separate from any exploitation of police illegality so as to be purged of the primary taint.

Another doctrine used by the government to overcome the exclusionary rule is the so-called "independent source" doctrine of *Silverthorne Lumber Co., Inc. v. United States,* 251 U.S. 385 (1920). In that case the government had illegally seized the petitioner's corporate books and documents. The government photographed the items before returning them and used the photographs as a basis to subpoena the petitioner to produce the originals before the grand jury. The petitioner refused to comply and was cited for contempt. Writing for the Court, Justice Holmes stated:

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it

> shall not be used at all. *Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others,* but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." (Emphasis supplied.) *Silverthorne, supra* at 392.

Even though the material could have legally been subpoenaed had the government known of its existence from a nontainted source, once the government embarks on an illegal course of conduct the illegality cannot be attenuated by an otherwise lawful subpoena: "The rights . . . against unlawful searches and seizures are to be protected even if the same result might have been achieved in a lawful way." *Silverthorne, supra* at 392.

The *Wong Sun* and *Silverthorne* doctrines have been used by this Court only in determining whether the Court should suppress *derivatively* obtained evidence. A typical attenuation case deals with a confession arising out of an unreasonable arrest or other illegal police activity: *Wong Sun v. United States, supra; Brown v. Illinois,* 422 U.S. 590 (1975); *Dunaway v. New York,* 442 U.S. 200 (1979); *Rawlings v. Kentucky,* 448 U.S. 98 (1980); *Taylor v. Alabama,* ____ U.S. ____, 102 S.Ct. 2664 (1982); *United States v. Bayer,* 331 U.S. 274 (1946); *Thomas v. Arizona,* 356 U.S. 390 (1958); *Harrison v. United States,* 392 U.S. 219 (1968). Other attenuation cases deal with evidence derivatively obtained from illegal wiretaps: *Nardone v. United States, supra; Lanza v. New York,* 370 U.S. 139 (1962); *United States v. Giordano,* 416 U.S. 505 (1974). *See also, Johnson v. Louisiana,* 406 U.S. 356 (1972) (lineup); *United States v. Crews,* 445 U.S. 463 (1980) (in-court identification); *United States v. Ceccolini, supra* (witness found as a result of an illegal search).

All attenuation cases pose the following question: "[W]hether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the 'taint' imposed upon that evidence by the original illegality." *United States v. Crews, supra* at 472. Put another way, it has been said that "[t]he notion of the 'dissipation of the taint' attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost." *Brown v. Illinois, supra* at 610 (Powell, J., concurring).

The lower court cases that have allowed the admission into evidence of contraband seized under a warrant obtained after an illegal initial entry have generally been decided on a misapplication of two complimentary theories: first, that the illegal police entry into a dwelling does not encompass the "seizure" of the later-discovered contraband; and second, that subsequently obtained search warrants provide an "independent source" for the search of the dwelling and the seizure of the evidence.

In the recent case of *People v. Arnau,* 58 N.Y.2d 14 (1982), an undercover officer bought cocaine from the defendant at the defendant's apartment. While there, the officer observed a large quantity of narcotics. A half hour later, the police entered defendant's home and handcuffed him to a radiator. Although the police made a security check for other occupants, "no search for evidence was conducted at that time and no evidence was discovered or seized." *Arnau,* supra at 30. Four hours later, a warrant was signed and then executed after being displayed to the defendant, at which time the contraband was discovered. The court held that the contraband was not "seized" until it was discovered and therefore was not subject to the exclusionary rule:

> "Since there is not the slightest hint that the search warrant was in any way tainted by the illegal entry or that the police exploited the entry in an effort to obtain evidence, we hold that the evidence seized is not the fruit of the poisonous tree and that the exclusionary rule is, therefore, inapplicable to this case." *Arnau, supra,* at 33.

The *Arnau* court held that the "independent source" exception to the exclusionary rule applied:

> "We believe that . . . where the evidence sought to be suppressed is the product of an independent source entirely free and distinct from proscribed police activity, it should be admissible and not subject to a *per se* rule of exclusion based solely on the unlawful conduct." *Arnau, supra* at 35.

See also, United States v. Fitzharris, 633 F.2d 416 (5th Cir. 1980) (independent source): *United States v. Beck,* 662 F.2d 527 (8th Cir. 1981) (close question as to exigent circumstances; independent source); *State v. Fenin,* 154 N.J. Sup. 282, 381 A.2d 364 (1977) (independent source); *People v. Barndt,* 199 Colo. 51, 604 P.2d 1173 (1980) (no "seizure" until warrant arrived).

Arnau, supra, and the above cited lower court cases are distinguishable from the instant case in two ways: first, the impoundment of the dwelling in those cases was always for a short period of time, usually just a few hours; and second, in most of the cases the arrestee remained in his home until the warrant arrived, a fact which would tend to deter the police from conducting a full-fledged search before the arrival of the warrant.

What is particularly disturbing about the cases adverse to petitioners' position is that they all misapply the doctrine of attenuation, and in so doing greatly diminish the protection afforded by the Fourth Amendment. *See, Arnau, supra* at 40-41 (dissenting opinion).

In the instant case, the doctrine of attention can only be properly applied if this Court decides that the contraband was not actually "seized" until the search warrant arrived, nineteen hours after the agents illegally entered and seized petitioners' dwelling. But such a holding would render the Warrant Clause of the Fourth Amendment meaningless. Under the attenuation doctrine as applied to pre-warrant impoundment cases, the result would be the uniform finding of an "independent source" for the discovery of the contraband, to wit, the knowledge the police lawfully possessed before they illegally entered the home. If the *Wong Sun* theory is applied to such cases, it would not matter how many hours, days, or weeks the police occupied the dwelling, just so long as they eventually obtained a search warrant, based on probable cause that existed before their illegal activity, and waited for that warrant before actually opening the containers bearing the contraband. Under the "independent source" theory, a warrant would never be required so long as the police had probable cause to believe that there was contraband in a suspect's home; the "independent source" would always be the information the police had legally acquired before embarking on their unconstitutional conduct. A result which serves to make the Fourth Amendment a nullity must surely be rejected:

> "Mechanical application of the traditional *Wong Sun* 'independent source' analysis where a search warrant is subsequently commissioned albeit supported by an affidavit that relies upon independent evidence, would allow police officers to treat the warrant requirement as merely an *ex post facto* formality." *United States v. Allard, supra* at 1185, n. 3.

III.

THE POLICE ACTION WAS SO FLAGRANTLY ABUSIVE OF PETITIONERS' RIGHTS, AND SO LACKING IN GOOD FAITH, THAT AN "IMPOUNDMENT ALTERNATIVE" SHOULD BE REJECTED, THE EXCLUSIONARY RULE SHOULD BE APPLIED, AND THE EVIDENCE SEIZED SHOULD BE SUPPRESSED.

A. The Purposes of the Exclusionary Rule Would Be Achieved By Its Application In This Case.

In *Weeks v. United States,* 232 U.S. 383 (1914), this Court established the exclusionary rule: evidence obtained in violation of a person's Fourth Amendment rights must be suppressed in federal cases:

> "The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures. . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." *Weeks, supra* at 391-92.

Historically, the exclusionary rule derived from two policies: deterring police misconduct and maintaining the integrity of the courts. *Dunaway v. New York, supra* at 217-18. In recent years, deterrence has become the predominant rationale for the rule, *United States v. Calandra,* 414 U.S. 338, 348 (1974), and concern with preserving the integrity of the judicial process has receded in importance. *Stone v. Powell,* 428 U.S. 465 (1976). In cases of disgraceful police

misconduct, however, such as obtains in the instant case, the rationale of judicial integrity has singular force.

The exclusionary rule was adopted, quite simply, because other measures theoretically available were found not to be effective in deterring police behavior that was violative of the Fourth Amendment. *Mapp v. Ohio, supra.*

Though arising in a context of past police misconduct, in essence the rule looks forward: it is designed to deter the police from violating the Constitutional rights of the people *in futuro.* "The [Fourth] Amendment is designed to prevent, not simply to redress, unlawful police action." *Chimel v. California,* 395 U.S. 752, 766, n. 12 (1969).

The exclusionary rule has not been utilized by this Court in all cases where there are Fourth Amendment violations. Its most fundamental application is in cases like the one at bar where the police behavior has been outrageous, when both the need for deterrence and the probability of its success are high. "As with any remedial device, the application of the rule has been restricted to those cases where its remedial objectives are thought most efficaciously served." *United States v. Calandra, supra* at 349.

Notwithstanding the *Calandra, supra,* language referring to a restricted application of the rule, this Court has never failed to invoke the rule in the suppression of primary, *i.e.,* non-derivative evidence unlawfully seized from a dwelling or other premises without a warrant. *See, for example, Weeks v. United States, supra; Silverthorne Lumber Company, Inc. v. United States, supra; Agnello v. United States, supra; Taylor v. United States,* 286 U.S. 1 (1932); *Johnson v. United States, supra; United States v. Jeffers,* 342 U.S. 48 (1951); *McDonald v. United States, supra; Mapp v. Ohio, supra; Payton v. New York, supra.*

The elements of police misbehavior herein add up to a

disgraceful and purposeful disregard of the safeguards of the Fourth Amendment. The warrantless forced entry of the police into petitioners' dwelling, at nighttime, after asking for and failing to receive authorization from the United States Attorney; the absence of exigent circumstances; the seizure and occupation of the premises for an exorbitant amount of time; the fact that a warrant was easily obtainable — all these facts virtually shout out for the invocation of the exclusionary rule. The contraband illegally seized at petitioners' apartment is admittedly extremely probative of their guilt. But the fact that it is perhaps more trustworthy and reliable than oral or other kinds of evidence does not remove it from the protection of the Fourth Amendment and the sanction of the exclusionary rule:

> "Our decisions recognize no exception to the rule that illegally seized evidence is inadmissible at trial, however relevant and trustworthy the seized evidence may be as an item of proof. The exclusionary rule was fashioned as a sanction to redress and deter overreaching governmental conduct prohibited by the Fourth Amendment. To make an exception for illegally seized evidence which is trustworthy would fatally undermine these purposes." *Davis v. Mississippi*, 394 U.S. 721, 724 (1969).

The guilt or innocence of an individual in a criminal proceeding is of extreme importance, never more so than in these times when fear of crime is endemic. But it is more important surely that all of us live as free men and women, safe in our homes from lawless government intrusion.

> "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp v. Ohio, supra* at 659.

It is important to recognize that the Court is not facing a form of police conduct which has any defenders. No one argues that the police should disobey their supervisors and violate the Fourth Amendment; no one argues that it is necessary to enter illegally without a warrant in the absence of exigent circumstances. In fact, it is not at all clear that anyone claims that the number of times that the police engage in this particular form of misconduct is very great. It would be hard to argue, therefore, that this police conduct either warrants protection or needs any protection. This Court is being asked to disallow the police from violating the Fourth Amendment in an egregious and indefensible manner which serves no useful purpose, and in a way that can only discredit the police and the criminal justice system.

B. The "Good-Faith" Exception to the Exclusionary Rule Does Not Apply In This Case.

The best known exposition of the so-called "good-faith" exception to the exclusionary rule appears in *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980). In *Williams*, a federal agent who had previously arrested the defendant in Ohio and knew that defendant's appeal bond restricted her movements to within that State happened to observe the defendant at the Atlanta airport. The agent arrested her for violation of the bond and uncovered narcotics during a search incident to the arrest. Although a question was raised as to the authority of the agent to make the arrest, the court held that technical legal deficiencies of the arrest would not in any event give rise to application of the exclusionary rule to the contraband:

> "[W]e now hold that evidence is not to be suppressed under the exclusionary rule where it is discovered by

> officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized. We do so because the exclusionary rule exists to deter willful or flagrant actions by police, not reasonable, good-faith ones. Where the reason for the rule cases, its application must cease also." *Williams, supra* at 840.

To date, this Court has not adopted a "good-faith" exception. *Taylor v. Alabama,* ____ U.S. ____, 102 S.Ct. 2664 (1982). Nonetheless, the Court in several cases has mentioned good faith as germane to its decision.

In *United States v. Peltier,* 422 U.S. 531 (1975), for example, the Court held that *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973), a case limiting the power of roving border patrols to stop people, need not be applied retroactively. The Court felt that the "imperative of judicial integrity", one of the underpinnings of the exclusionary rule, would not be offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law, even if later cases hold that such conduct is not permitted. *Peltier, supra* at 538-39.

In *Michigan v. Tucker,* 417 U.S. 433 (1974), this Court suggested that the nature and willfullness of the proscribed police activity should be carefully examined to see whether the prime purpose of the exclusionary rule, deterrence, would be achieved by the exclusion of the illegally seized evidence. In *Tucker,* the evidence in question was the testimony of a witness whose name had been supplied to the police by the accused after an interrogation in which the police failed to advise the accused completely of his *Miranda* warnings. *Miranda v. Arizona,* 384 U.S. 436 (1966), had been decided in the period between Tucker's arrest and his trial.

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." *Tucker, supra* at 488.

It is imperative to note that the good-faith exception has only been applied to technical violations of a defendant's rights; all are cases in which the police behavior has been impeccable. But the instant case is not one where, for example, the police possessed a warrant that they believed to be valid but that later turned out to be wrongly issued by a magistrate. This is not a case where, for example, the police misunderstood the law, or were applying a statute that was at a later time declared unconstitutional. The deprivation of petitioners' rights herein indeed resulted from "willful, or at the very least negligent" conduct of law enforcement officials, and the good-faith exception has absolutely no application to the instant case.

C. The Flagrant Nature of the Official Misconduct Precludes the Adoption of an "Impoundment Alternative"

It is petitioners' contention, as fully set forth above, that absent exigent circumstances, the police may not Constitutionally enter a dwelling without a warrant. In contrast, *Arnau, supra, et al.*, by misapplying the doctrine of "independent source" would allow the police under *any*

circumstances to enter premises pending the arrival of a hoped-for warrant.

Between the two lies the "impoundment alternative", an exception to the warrant requirement which would allow police to, *under certain circumstances,* secure premises in anticipation of a search warrant. 2 La Fave, *Search & Seizure,* sec. 6.5(c) (1978).

Although this Court has never recognized impoundment as an exception to the warrant requirement, there was a suggestion of a legitimate role for impoundment in *Mincey v. Arizona,* 437 U.S. 385 (1978). In holding that a warrant was necessary to search a home, even if it were the scene of a murder, the court stated:

> "There was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant. *Indeed, the police guard at the apartment minimized that possibility.*" (Emphasis supplied). *Mincey, supra* at 395.

It is important to note that *Mincey* was decided before *Payton, supra,* and that therefore the police in *Mincey* entered the premises lawfully in order to carry out a lawful arrest.

Unlike the instant case, the guard alluded to in *Mincey* had an irrefutable justification for remaining there: they were guarding suspects while awaiting arrival of homicide detectives who under Arizona law had responsibility for investigating the incident. More crucially, the limited impoundment alluded to by the Court could be seen as justifiable because the warrant could *not* have been obtained *earlier.* In *Mincey* a homicide had occurred during the course of a lawful arrest. If as suggested by the Court, while police officers were guarding the wounded suspects, others swiftly procured a warrant, in fact a warrant would have been

obtained at the earliest possible time. In short, the situation in *Mincey* is entirely at odds with the facts in the instant case.

An impoundment exception to the Warrant Clause would necessitate in each case an evaluation of the flagrancy of police behavior. Clearly, whatever the merits of the impoundment alternative may be, its use in this case would be totally unwaranted. The flagrant nature of the police misconduct calls instead for application of the exclusionary rule, which is of singular importance where the "purpose and flagrancy of the official misconduct" can be deemed particularly offensive to the Constitution. *Brown v. Illinois*, 422 U.S. 590, 605 (1975). *See also, Brown, supra* at 611 (Powell, J., concurring); *Dunaway v. New York, supra* at 227 (Rehnquist, J., dissenting).

The examples of flagrancy in this case are both numerous and substantial:

1. The illegal intrusion was into a home, the most clearly defined zone of privacy protected by the Fourth Amendment. *Payton v. New York, supra.*

2. The illegal entry occurred at nighttime, when an individual has the greatest expectation of privacy from governmental intrusion. *Jones v. United States*, 357 U.S. 493, 498 (1958).

3. The agents entered the dwelling without a warrant even though there was sufficient time and opportunity to obtain one. At the time that Agent Palumbo telephoned the United States Attorney, at 6:30 p.m., the facts upon which the agents would rely in obtaining a warrant were already known to them (J.A. 10,18). The warrantless entry occurred almost five hours later, at 11:15 p.m. (J.A. 10).

"Administrative delay" is absolutely no excuse for the failure to secure a warrant before entry. "No reason, except inconvenience of the officers and delay in preparing papers

and getting before a magistrate, appears for the failure to seek a search warrant. But those reasons are no justification for by-passing the constitutional requirement . . ." *McDonald, supra* at 455.

The agents' failure to secure the required warrant must be viewed in light of the Federal Rules of Criminal Procedure, as amended in 1977, which provide for the issuance of search warrants by telephone. F.R.C.P. Rule 41(c)(2). The obvious purpose of this provision is to shorten the time necessary to obtain a warrant. No reason has been given by the government for its failure to utilize this provision.

The Eastern District of New York, wherein the crime occurred, is one of the most populous judicial districts in the country. It encompasses all of Brooklyn, Queens, and Staten Island in New York City, and the counties of Nassau and Suffolk on Long Island. There are thirteen district court judges assigned to the district, as well as four magistrates. Furthermore, F.R.C.P. Rule 41(a) provides that a warrant may be issued by a judge of a state court of record within the district. There were, at the time of this incident, a total of 447 state court judges within the Eastern District of New York. Surely the government's answer that the magistrate "could not be found" (Tr. 154) is an unacceptable excuse for the failure to obtain a warrant. In *Rawlings v. Kentucky,* 448 U.S. 98 (1980), the police in Bowling Green, Kentucky, were able to obtain a search warrant within forty-five minutes of their determination that such a warrant was needed. Certainly the agents in New York City could have done as well. It is ludicrous for the government to ask this Court to accept a delay of nineteen hours. The agents could have, and should have, secured a warrant before the illegal entry.

Professor La Fave, in his discussion of the impoundment

alternative, makes it very clear that time is of the essence in a determination of the validity of the impoundment:

> "The intrusion takes on a greater degree of offensiveness as time passes, and thus it would seem that the promptness with which a warrant may be obtained is a highly relevant consideration. It may be said, then, that the impoundment procedure is most likely to pass muster if utilized in conjunction with an oral search warrant process, whereby the telephone may be utilized to obtain a prompt magisterial determination as to whether a search may be undertaken." 2 La Fave, *supra* at 454.

4. The agents who impounded the apartment demonstrated their willful and flagrant disregard of the Constitution by disobeying the orders of the prosecutor and the agent in charge. The Assistant United States Attorney directed Agent Palumbo to have his men "secure the premises *outside* the premises". (Emphasis supplied) (Tr. 446-47). Furthermore, Agent Palumbo directed the agents *not* to enter the apartment (Tr. 295). The actions of the agents in entering without any shred of authorization, indeed, flying in the face of Agent Palumbo's admonishment to the contrary, shows a complete lack of "good-faith" and instead indicates a flagrant disregard for the seriousness of Fourth Amendment protections.

5. The entry was forcible. At least one of the agents had his gun drawn at the time of the entry. No request was made of petitioner Colon or any of the other occupants of the apartment for permission to enter (J.A. 10-11, 19). This action alone warrants application of the exclusionary rule. "Having forced an entry without either a search warrant or an arrest warrant to justify it, the felonious character of their entry, it seems to me, followed every step of their journey inside the house and tainted its fruits with illegality." *McDonald, supra* at 459 (Jackson, J., concurring).

6. All of the occupants of the apartment were illegally arrested and removed from the premises. True, the petitioners have no standing to complain of the police action against the other three persons in the apartment, but the agents' treatment of the occupants provides additional evidence of the police-state tactics employed. Charges were of course dismissed against the three other occupants several days after their arrest. The police behavior here can be contrasted to that in *Rawlings v. Kentucky, supra,* where police were legally on the premises and visitors who were detained for a short period of time while awaiting the arrival of a search warrant were given the option of leaving if they would consent to a body search.

Similarly, the government may not invoke *Michigan v. Summers,* ____ U.S. ____ , 101 S.Ct. 2587 (1981), to justify the police behavior in the instant case. In *Summers,* the police had a search warrant when they entered the dwelling and detained the occupants while a proper search was conducted, in contrast to the instant case where there was no warrant and the occupants were not merely detained but were arrested and removed from the premises.

7. The agents remained in the dwelling alone for nineteen hours, exerting full dominion and control over the apartment and its contents. The violation of petitioners' rights was intensified by this lengthy impoundment. The fact that the petitioners were in police custody did not lessen their rights of privacy in their entire apartment. *Mincey v. Arizona, supra* at 392.

Not only did the actions of the agents prevent the normal use of the dwelling for an absurdly extended period of time, but the agents were left *alone* to rummage around as they pleased.

The police took the precaution of illegally arresting and

removing all of the occupants — who might indeed have observed what the agents did or did not do for nineteen hours. This flagrant action by the law enforcement officials prejudiced petitioners' ability to support their motion to suppress the evidence and to defend themselves at trial. *See Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc.*, 430 U.S. 388, 426 (1971) (Appendix to opinion of Burger, C.J., dissenting).

In short, we have only the agents' word that the apartment was not completely searched and the contraband discovered until after the search warrant was obtained. These were the very officers who had entered without a warrant in knowing and cynical disregard of Fourth Amendment rights. Moreover, as set forth, *infra*, the application by these officers for a search warrant — when, at long last this was initiated — was less than a full and truthful document.

Therefore, we must take with a grain of salt the account of what actually transpired and did not transpire during the nineteen long hours of the agents' occupation. Unfortunately, "history shows that the police acting on their own cannot be trusted." *McDonald, supra* at 456. The same reason that the Warrant Clause of the Fourth Amendment requires a magistrate to pass on the desires of the police to enter a persons' home militates against the Court's permitting the police to occupy a person's home with the expectation that the police will observe the Constitutional niceties.

The Court has accepted the proposition that special circumstances, including the prolonged nature of an intrusion, may be considered in assessing Constitutional implications of police behavior. Thus, in *Michigan v. Summers, supra,* where it was held that a search warrant carries with it the limited authority to detain the occupants of the premises while a proper search is conducted, it was

suggested that ". . . special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case. . ." *Summers, supra* at 2595. Although *Summers* referred to the detention of persons rather than the "detention" of a person's home and belongings, the same reasoning may be applied to the seizure of a home, since "the sanctity of private dwellings (is) ordinarily afforded the most stringent Fourth Amendment protection." *United States v. Martinez-Fuerte,* 428 U.S. 543, 561 (1976). Certainly nineteen hours is a "prolonged detention" and demonstrates the "purpose and flagrancy" of the official misconduct.

Even if an impoundment procedure is permitted by this Court, the agents had no right to remain *inside* the apartment once they had completed their security check and removed all occupants therefrom:

> "It does seem clear . . . that if the only risk is loss of evidence by someone thereafter entering the premises, then the police may not take the more intrusive step of making entry into the premises and guarding it from within while a search warrant is obtained." 2 La Fave, *supra* at 452.

8. The search warrant affidavit omitted mention of the entry by the agents into the petitioners' apartment and failed to include any observations of the agents while in the apartment (J.A. 28-29). Although the lower courts found that the warrant was valid (J.A. 13, 31-32), the act of omission by the law enforcement officials of course resulted in the magistrate's being misled and served to debase his Fourth Amendment function. By deliberately withholding the fact of the ongoing seizure from the magistrate, the agents and the United States Attorney thus "eviscerate(d) the very purpose of the warrant requirement which is to place a neutral magistrate between the public and police conduct."

United States v. Allard, supra at 1187. Even if the Court adopts an impoundment exception, clearly the facts do not support its application here.

* * * * * *

The extent of the police illegality in this case, the entry into a home, at night, without consent and without a warrant, the impounding and remaining in the home for nineteen hours, are inexcusable. Such behavior is the quintessential lawlessness which the Founding Fathers did their best to prevent in drafting the Fourth Amendment: the midnight banging on the door by police acting in total and cynical disregard of basic human rights. The hope of vigorously enforcing the Fourth Amendment can only be achieved by telling the government in the clearest possible language that outrageous police conduct cannot and will not be tolerated.

CONCLUSION

The judgments of the court of appeals should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

ANDRES SEGURA and LUZ MARINA COLON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether evidence discovered pursuant to a valid, untainted search warrant should be suppressed because police had improperly entered the premises before the warrant was issued.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-5298

ANDRES SEGURA and LUZ MARINA COLON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals on the interlocutory appeal (J.A. 17-27) is reported at 663 F.2d 411. The opinion of the court of appeals affirming the convictions (J.A. 30-32) is unreported. The opinion of the district court (J.A. 3-16) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1982 (J.A. 30). The petition for a writ of certiorari was filed on August 27, 1982, and was granted on February 22, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the district court's grant of petitioners' suppression motion, the United States took an appeal pursuant to 18 U.S.C. 3731. The court of appeals affirmed in part and reversed in part (J.A. 17-27). Petitioners were then tried before a jury in the United States District Court for the Eastern District of New York and were convicted of distributing, possessing with intent to distribute, and conspiring to distribute, cocaine, in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner Segura was sentenced to concurrent terms of 10 years' imprisonment on each count, followed by concurrent 15-year special parole terms on each of the three substantive counts. Petitioner Colon was sentenced to concurrent sentences of eight years' imprisonment followed by a special parole term of 15 years on each of the three substantive counts. The court of appeals affirmed (J.A. 30-32).

1. a. The evidence at the suppression hearing showed that in late January and early February 1981, government agents kept petitioners under close surveillance after receiving a tip that cocaine sales were being negotiated at petitioners' apartment. On January 29, 1981, the agents saw petitioners meet with a man in a bar. When the group departed, the man followed petitioners to their apartment. Petitioners went inside while the man waited in his car. Shortly thereafter, petitioner Segura came outside with a rolled up newspaper under his arm and entered the man's car. Two minutes later, Segura exited the car carrying the newspaper, which was now folded and flat (H. Tr. 81-92). On February 8, Segura again briefly visited the same man. That same day the agents observed Segura meet with a known narcotics violator (H. Tr. 96-98).

The following day, the agents observed Segura drive from his apartment to a motel. Enrique Rivudalla-Vidal joined Segura in his car while it was parked outside the motel, and the two men discussed for about 10 minutes

the possibility of Segura selling Rivudalla one kilogram of cocaine on consignment (H. Tr. 98-100, 150, 342-343). On February 12, 1981, Segura called Rivudalla and agreed to provide Rivudalla with one-half kilogram of cocaine. Segura arranged to deliver the cocaine to Rivudalla at 5:00 p.m. at a Burger King (H. Tr. 150, 342-343). At the appointed hour, petitioners Segura and Colon drove to the restaurant, subject to police surveillance. Within a few minutes, Rivudalla and his fiancee, Esther Parra, also pulled into the Burger King parking lot. Segura met Rivudalla at the restaurant door, and they talked for five or ten minutes. Colon joined the two men and then walked to Rivudalla's car carrying a bulky shoulder bag. She stayed with Parra in the car for a couple of minutes. When she left, Colon closed the zipper on her shoulder bag, which the agents observed was now noticeably thinner. Rivudalla and Parra then left the Burger King (J.A. 4; H. Tr. 101-120, 594-598).

Two agents followed Rivudalla and Parra and stopped the couple for questioning before they entered their apartment. Upon learning that a brown paper bag being carried by Parra contained a glassine bag of white powder (later determined to be cocaine), the agents placed the couple under arrest.[1] Rivudalla agreed to cooperate with the police after being advised of his constitutional rights (H. Tr. 135-148). Rivudalla admitted that he had purchased the cocaine from Segura, and that Colon had delivered the cocaine to Parra at the Burger King. Furthermore, Rivudalla informed the agents that he and Segura had agreed that Segura would call him later that evening to find out whether he had been able to sell the cocaine (J.A. 18; H. Tr. 149-151).

b. Between 6:30 and 7:00 p.m., the agents obtained authorization from an Assistant United States Attorney

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[1] **Rivudalla and Parra were indicted with petitioners. They pleaded guilty to the charges and absconded prior to sentencing.**

to arrest petitioners but were advised that a search warrant probably could not be obtained until the following day. The attorney also advised the agents to secure the premises because of the danger that evidence would be destroyed before the warrant issued (H. Tr. 152-154; 444-445). The agents proceeded to petitioners' apartment and listened at the door, but they heard nothing to indicate that the apartment was occupied. The agents then commenced surveillance of the apartment. At first, they posted themselves at the fire escape at the end of petitioners' hall. Later, they moved outside the building (J.A. 10, 18-19; H. Tr. 363-364, 394-397).

At approximately 11:15 p.m., the agents observed Segura enter the building alone, and they arrested him in the lobby of the building. The agents took Segura upstairs to his apartment, although Segura was reluctant to go, falsely maintaining that it was not his apartment. The agents knocked on the door and entered when a woman, later identified as petitioner Colon, opened the door. In addition to Colon, the agents found three other persons seated in the living room.[2] The agents explained that Segura was under arrest and that they were obtaining a search warrant for the premises. The agents then performed a limited security check of the premises to determine whether any other persons were hiding there. In the course of the security check, the agents discovered in plain view on a bedroom desk a triple beam scale and several jars of lactose, and they also saw numerous small cellophane bags in a closet, but they left these items untouched (J.A. 10-11, 19; H. Tr. 258-259, 364-367, 375-376, 401-406). Colon subsequently was arrested,[3] and petitioners and the other occupants of the

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[2] Two of these persons were charged in the original indictment, but a superseding indictment subsequently was returned that charged only petitioners, Rivudalla, and Parra (see H. Tr. 3).

[3] Incident to this arrest, Colon's handbag was searched before she was allowed to take it with her to headquarters. A loaded

apartment were taken to Drug Enforcement Administration headquarters. Two agents remained in the apartment to secure the premises until the search warrant was obtained (J.A. 11, 19; H. Tr. 156-160, 374-379).

A search warrant application was presented to a magistrate at 5:00 p.m. the next day, and a warrant was issued and executed.[4] The agents discovered nearly three pounds (1250 grams) of cocaine in an attache case, two ounces of cocaine in the pocket of a trench coat, 18 rounds of ammunition for the revolver that had been found in Colon's purse when she was arrested, over $54,000 in cash, and records of narcotics transactions. These items were then seized along with the other evidence that had first been seen in plain view in the course of the security check the previous night (J.A. 11, 19-20; H. Tr. 380-385).

2. Following a hearing, the district court granted petitioners' motion to suppress all the evidence seized from the apartment (J.A. 3-16). The court found that there were no exigent circumstances to justify the warrantless entry into the apartment and hence that the original entry and security check of petitioners' apartment was illegal (J.A. 11-13). The court concluded that the search warrant itself was valid because it rested upon a showing of probable cause arising from information untainted by the illegality (J.A. 13), but, relying heavily on *United States* v. *Griffin*, 502 F.2d 959 (6th Cir.), cert. denied, 419 U.S. 1050 (1974), the court held that the evidence seized pursuant to the warrant nonetheless had to be suppressed because of the illegal entry (J.A. 13-16). The

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revolver and more than $2,000 in cash were found (H. Tr. 370-371). Those items were ordered suppressed by the district court as the fruits of an illegal arrest (J.A. 13, 16).

[4] One agent explained that the application was not presented earlier in the day because most of the day was spent processing the arrests and presenting petitioners, Rivudalla, Parra, and the other three occupants of petitioners' apartment to a judicial officer (H. Tr. 161).

court concluded that the evidence would not inevitably have been discovered in the absence of the illegal entry because petitioner Colon might have destroyed it before the warrant could be executed (J.A. 15).

The court of appeals affirmed in part and reversed in part (J.A. 17-27). The court agreed that the warrantless entry was not justified by exigent circumstances (J.A. 21-23), but it held that the evidence discovered pursuant to the valid warrant search was admissible (J.A. 24-26). The court specifically rejected the district court's analysis, explaining that the fact that persons were present in the apartment who might otherwise destroy the evidence was a "prudentially unsound" basis for suppression because it would penalize the officers for the correctness of their belief that persons were present who posed a danger of destruction of the evidence (J.A. 25). The court further held, however, that the evidence discovered in plain view in the course of the initial entry should be suppressed (J.A. 26-27). The court reasoned that suppression of such evidence would deter officers from abusing the security check procedure (J.A. 27). Petitioners were then tried and convicted, and the court of appeals affirmed their convictions (J.A. 30-32).[5]

SUMMARY OF ARGUMENT

The question in this case concerns the application of the exclusionary rule—should evidence discovered pursuant to a valid search warrant be suppressed because of an earlier illegal entry? It has heretofore been well established that evidence is subject to suppression only if

[5] On the second appeal, the court rejected the contention that the search warrant was invalid because of material misrepresentations in the affidavit, holding that this contention was foreclosed by the court's decision on the government's pretrial appeal and that, in any event, the district court had correctly concluded that there were no material misstatements in the affidavit (J.A. 31-32). The court also rejected the contention that the evidence was insufficient (J.A. 32).

it is the "fruit" of an illegality, *i.e.*, if it is discovered through exploitation of the illegality. *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963). The evidence in question here was not unlawfully seized, nor was the illegal entry or search exploited in order to discover the evidence. Because the evidence was derived from an "independent source," it should not be suppressed.

A. The evidence in question was not illegally seized when the officers entered the apartment and secured the premises. Assuming arguendo that the officers' action in securing the premises can be characterized as a "seizure" of the evidence, which they had not yet discovered, it was not an unreasonable seizure in violation of the Fourth Amendment. The officers undisputedly had probable cause to believe that there was contraband in the apartment. While probable cause alone did not give them the authority, in the absence of a warrant or exigent circumstances, to *enter* the apartment, which would entail a limited search, it did entitle them to preserve the status quo pending the issuance of a warrant by securing or "seizing" the premises. Because seizures in a public place involve no invasion of privacy interests, they generally do not require a warrant (see, *e.g.*, *Payton* v. *New York*, 445 U.S. 573, 587 (1980); *United States* v. *Watson*, 423 U.S. 411 (1976)); and this Court has specifically approved the seizure of a container on the basis of probable cause pending the issuance of a warrant authorizing its search. *Arkansas* v. *Sanders*, 442 U.S. 753, 764 n.13 (1979). By the same token, securing premises on the basis of probable cause by stationing officers outside to prevent entry and the removal of its contents until a search warrant is obtained is not an "unreasonable seizure." See, *e.g.*, *Mincey* v. *Arizona*, 437 U.S. 385, 394 (1978). In sum, while the entry and security check of petitioners' apartment in the absence of exigent circumstances constituted an illegal *search*, the officers did not effect any illegal seizure; hence, the evidence should

be suppressed only if it was discovered through exploitation of the illegal entry.

B. Evidence is suppressible as a fruit of the poisonous tree if it is discovered through exploitation of an illegality, but it clearly cannot be a fruit if the illegality is not even a "but-for cause" of the discovery of the evidence. See *United States* v. *Crews*, 445 U.S. 463, 471 (1980). Here, the discovery of the evidence did not derive from any information learned during the illegal entry and search. The officers did not discover the evidence in question until they executed the lawful search pursuant to the warrant. The warrant itself was based on probable cause known to the officers before the illegal entry took place, and hence was not tainted by the illegality. In short, the discovery of the evidence pursuant to the search warrant transpired exactly as it would have if the illegal entry had never occurred, and thus the evidence should not be suppressed as a fruit.

The only way in which it can be argued that the illegality was a "but-for cause" of the discovery of the evidence is by speculating that, if the officers had not entered to secure the premises, petitioner Colon would have successfully destroyed the evidence before the warrant was obtained. This analysis, which was the basis for the district court's decision, was correctly rejected by the court of appeals as "prudentially unsound" (J.A. 25). Suspects have no constitutional right to destroy evidence—indeed, it is a criminal offense to do so (see 18 U.S.C. 2232)—and the exclusionary rule should not be invoked to suppress evidence solely on the theory that improper police action may have prevented an individual from destroying the evidence during the time a warrant was being procured.

Moreover, suppression on this basis has elements of logical self-contradiction. An illegal entry can be the but-for cause of the discovery of evidence in this sense *only* if there were persons present in the apartment who

would have removed or destroyed the evidence before a warrant was obtained. But in that case exigent circumstances would exist that would justify a warrantless entry into the apartment to prevent the destruction of evidence. Consequently, there is considerable tension between the two underpinnings of the district court's decision—that exigent circumstances did not justify the entry and that the entry caused the discovery of the evidence because it prevented Colon from destroying it before the warrant issued. Moreover, following the district court's approach would result in a bizarre anomaly. The officers would be penalized for being correct in their assessment of exigent circumstances. The evidence would be suppressed when the officers turned out to be correct and the apartment was in fact occupied by persons who could have destroyed the evidence; on the other hand, the evidence would not be suppressed when the officers mistakenly entered and the apartment was unoccupied, because in that case the entry could not possibly have aided the discovery of the evidence by preventing its destruction.

By the same token, established exclusionary rule principles clearly demonstrate that the evidence in question here cannot be characterized as a fruit. The "connection" between the illegality and the discovery of the evidence is extremely attenuated, and, indeed, it rests on the questionable assumption that, if the police had not entered when they did, Colon would have successfully destroyed all of the evidence before the warrant was obtained without any of the agents stationed outside being alerted. Moreover, the officers' decision, despite their reasonable view that exigent circumstances existed, not to conduct any evidentiary search except pursuant to a search warrant belies any suggestion that they "exploited" the illegality; hence, under the principles of *Wong Sun*, the evidence should not be suppressed as a fruit.

C. Petitioners' apparent contention (Br. 35-48) that the "flagrancy" of the officers' misconduct warrants suppression here wholly apart from whether the evidence

was derived from the misconduct is both theoretically and factually unsound. Because of the harsh consequences of the exclusionary rule, this Court has restricted its application to those situations where its purposes are best served. In particular, the Court has determined that evidence should be suppressed only when it is the fruit of an illegality under the *Wong Sun* test. When the discovery of evidence is causally connected to an illegality, the "flagrancy" of the constitutional violation is one important element of the consequent attenuation inquiry. See *Brown* v. *Illinois*, 422 U.S. 590, 604 (1975). Even in such cases, however, the occurrence of misconduct that could be termed "flagrant" does not completely displace the fruits inquiry, and, a fortiori, it cannot require suppression of evidence derived from a source wholly independent of the illegality.

Nor is suppression necessary here as a general deterrent to flagrant illegal entries to secure premises in other cases. As a practical matter, police officers who are in the process of applying for a warrant have little incentive to make an immediate entry unless they genuinely entertain substantial fears that, unless they act, the evidence will be destroyed before the warrant arrives. Thus, while they may sometimes be mistaken in such instances in their judgment that the circumstances are sufficiently exigent to justify warrantless entries, such improper entries will generally occur only in close cases; there is no investigative benefit to be reaped from a flagrant violation and hence no incentive for the police to commit one. On the other hand, even under the court of appeals' decision, there remain substantial disincentives to such illegal entries, such as civil liability and the suppression of evidence discovered other than pursuant to a warrant.

In any event, the officers' conduct here cannot be characterized as flagrant; indeed, it is open to serious question whether they committed any Fourth Amendment violation at all, and there can be no doubt that any mistake they made cannot be deemed egregious. A war-

rantless entry to prevent the destruction of evidence is permitted if the police have sufficient reason to believe that someone is on the premises who is likely to destroy the evidence before a warrant is obtained. Here, the officers undisputedly had probable cause to believe that there was contraband in petitioners' apartment. Because of the arrests that had occurred, the officers also had reason to fear that any occupants of the apartment would be alerted that something was amiss before the warrant issued; when Segura unexpectedly arrived after 11:00 p.m. alone, the officers had a strong basis to believe that Colon was inside the apartment, thereby materially enhancing the concern that the evidence might be destroyed. While the court of appeals disagreed and held that the facts known to the officers did not give them a sufficient basis to suspect that evidence was in danger of being destroyed, this is plainly a close question of law, and the illegality was based solely on a good faith legal misjudgment by the officers.

The other actions taken by the officers also belie the accusation that they acted in bad faith. They consulted with the United States Attorney's office before arresting petitioners and secured the premises on the advice of that office after being informed that a warrant could not be obtained until the following day. When they did enter the premises, they took only those steps necessary to ensure that evidence would not be destroyed and did not conduct an evidentiary search until the warrant was obtained. In sum, the officers' conduct here provides no basis for departing from the black letter principle that the exclusionary rule should not be applied to suppress evidence that is not obtained by exploitation of a violation of a defendant's rights.

ARGUMENT

EVIDENCE DISCOVERED AND SEIZED WHILE EXECUTING AN UNTAINTED SEARCH WARRANT SHOULD NOT BE SUPPRESSED AS THE PRODUCT OF A FOURTH AMENDMENT VIOLATION BECAUSE OF AN ANTECEDENT ILLEGAL ENTRY

This case concerns the admissibility of evidence discovered and seized in a search of an apartment conducted pursuant to a valid, untainted warrant. It presents a question concerning the proper application of the exclusionary rule—should such evidence be suppressed because, before the warrant was obtained, police officers illegally entered the apartment and secured the premises? [6] Thus, contrary to petitioners' repeated suggestion (Br. 6, 16-17, 28, 37-38, 48), the legality of the officers' conduct itself is not in issue here, and therefore the court of appeals' decision certainly does not "countenance[]" (Br. 24) police activity that threatens the public's right to "live as free men and women, safe in [their] homes from lawless government intrusion" (Br. 37). The question presented is not one of substantive Fourth Amendment law, but rather simply one of *remedy*—whether the policies underlying the exclusionary rule require that evidence discovered during a warrant search should be suppressed even though untainted by the prior illegal entry.

The principles that guide this determination are well established. The exclusionary rule has been viewed as a remedial measure necessary to deter constitutional violations by law enforcement officers by removing the incen-

[6] Both courts below found that the initial, warrantless entry into petitioners' apartment was not justified by exigent circumstances and hence violated the Fourth Amendment. Without conceding the correctness of that determination (see pages 38-40, *infra*), we do not contest it in this Court because of its fact-bound nature; we therefore assume arguendo throughout this brief that the officers' initial entry did violate the Fourth Amendment.

tive to commit those violations. See, *e.g.*, *Stone* v. *Powell*, 428 U.S. 465, 486 (1976). At the same time, this Court has repeatedly recognized that application of the exclusionary rule imposes significant costs on society by preventing the use at trial of reliable, probative evidence, thus allowing culpable defendants to go free. Accordingly, "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974).

The exclusionary rule generally provides that evidence obtained as the direct result of a violation of a defendant's Fourth Amendment rights should be suppressed. For example, evidence discovered in the course of an illegal search ordinarily should be excluded. See, *e.g.*, *United States* v. *Chadwick*, 433 U.S. 1 (1977). Such evidence is sometimes called "primary evidence" because it is discovered while the Fourth Amendment violation is occurring. See 3 W. LaFave, *Search and Seizure* § 11.4, at 612 (1978). In addition, evidence that is subsequently discovered through exploitation of a prior constitutional violation is subject to suppression as the "fruit of the poisonous tree" (*Nardone* v. *United States*, 308 U.S. 338, 341 (1939)). See, *e.g.*, *Brown* v. *Illinois*, 422 U.S. 590 (1975). In these "derivative evidence" situations, the relevant inquiry is whether the evidence was obtained "'by exploitation of [the prior] illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963) (citation omitted). Thus, some evidence may be admissible at trial even if a Fourth Amendment violation is the "but-for cause" of its discovery, provided the connection between the illegality and the evidence is sufficiently attenuated.

At a minimum, however, it is clear that suppression is appropriate only if "the challenged evidence is in some sense the product of illegal governmental activity." *United States* v. *Crews*, 445 U.S. 463, 471 (1980). If an

individual has been the victim of a Fourth Amendment violation, evidence nevertheless may be introduced against him if it is obtained from an "independent source" and thus is not the product of the illegality. *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920). In our view, this basic principle compels affirmance of the decision of the court of appeals, because the evidence first discovered in executing a valid search warrant at petitioners' apartment was not the product of the earlier illegal entry.

A. The Officers' Entry Into Petitioners' Apartment To Secure The Premises Was Not An Illegal Seizure Of All Of Its Contents

Petitioners' principal contention (Br. 22-34) is that the evidence in question,[7] which was first discovered in the course of a valid warrant search based on probable cause known to the officers before they entered petitioners' apartment, was illegally seized at the time of the entry and that such illegal seizure continued until the search warrant was executed. That is so, petitioners argue, because the officers' action prevented anyone from removing any of the contents of the apartment pending the issuance of the warrant (see Br. 24). Therefore, even though the evidence in question was not discovered in the course of or as a direct result of an illegal search, petitioners contend that it must be suppressed as "primary" (Br. 28, 36) illegally *seized* evidence.[8] This con-

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[7] We refer here to the cocaine, cash, and narcotics records that were not discovered until the warrant was executed. See page 5, *supra*. The scale, lactose, and cellophane bags observed by the agents in the course of their initial security check were ordered suppressed by the court of appeals, and their admissibility is not in issue here.

[8] The cases relied on by petitioners for this contention (Br. 36) are completely inapposite; they all concern the suppression of evidence *discovered* and seized in the course of an illegal *search*. Petitioners' contention does find support, however, in Ninth Cir-

tention must fail because there was no illegal seizure here; to the extent the officers' actions prior to the execution of the search warrant constituted a seizure of the evidence at issue, that seizure was justified by probable cause and did not violate the Fourth Amendment.

Assuming that the officers "seized" the evidence in question within the meaning of the Fourth Amendment when

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cuit decisions characterizing a securing of the premises after an illegal entry as an illegal seizure of the evidence within. *United States* v. *Lomas*, 706 F.2d 886, 893-894 (1983); *United States* v. *Allard*, 634 F.2d 1182, 1186-1187 (1980). Even the Ninth Circuit, however, has not taken as extreme a position as petitioners. Petitioners argue (Br. 29-34) that no "fruits" inquiry is appropriate because the evidence was illegally seized, but the Ninth Circuit has recognized the relevance of a "fruits" analysis in suggesting that such "illegally seized" evidence should not be suppressed if the government can show that it would have successfully obtained the evidence notwithstanding the seizure. *United States* v. *Allard*, *supra*, 634 F.2d at 1187.

Other courts of appeals have either expressly or implicitly rejected petitioners' seizure theory in considering the admissibility of evidence seized pursuant to warrant searches of premises that had previously been secured by means of an allegedly illegal entry. See *United States* v. *Beck*, 662 F.2d 527, 530 (8th Cir. 1981); *United States* v. *Fitzharris*, 633 F.2d 415, 421 (5th Cir. 1980), cert. denied, 451 U.S. 988 (1981); *United States* v. *Korman*, 614 F.2d 541, 542, 547 (6th Cir.), cert. denied, 446 U.S. 952 (1980); *United States* v. *Edwards*, 602 F.2d 458, 469 n.12 (1st Cir. 1979). Petitioners' reliance (Br. 24-25) on *United States* v. *Griffin*, 502 F.2d 959 (6th Cir.), cert. denied, 419 U.S. 1050 (1974), is misplaced. The *Griffin* court did not suggest that an illegal seizure had occurred; it held that the evidence *discovered* during an illegal entry was the fruit of an illegal *search*. The New York Court of Appeals has explicitly rejected petitioners' seizure theory. *People* v. *Arnau*, 58 N.Y.2d 27, 444 N.E.2d 13, 17-19, 457 N.Y.S.2d 763, 767-769 (1982); contra, *State* v. *Dorson*, 615 P.2d 740, 744 (Hawaii 1980); *People* v. *Shuey*, 13 Cal.3d 835, 850, 533 P.2d 211, 222, 120 Cal. Rptr. 83, 94 (1975) (securing premises is "inchoate seizure" before individual contents are "actually seized").

they secured petitioners' apartment,[9] there was nothing illegal about the seizure. Putting aside for the moment the officers' entry into the apartment, which necessarily resulted in a limited *search* (see Part B, *infra*), peti-

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[9] When police officers secure an apartment to prevent removal of its contents, there is some technical sense in which they can be said to have "seized" all the contents of the apartment. It seems clear, however, that police cannot actually "seize" a particular movable object in the ordinary sense of the word when they have not even discovered it yet, and thus it is open to serious question whether the underlying premise of petitioners' contention is correct, *i.e.*, that the evidence in question here was "seized" within the meaning of the Fourth Amendment when the officers secured the premises (see Pet. Br. 24). See, *e.g.*, 1 W. LaFave, *Search and Seizure* § 2.1, at 221 (1978) (citation omitted) (defining "seizure" as the " 'act of physically taking and removing tangible personal property' "); *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906) ("a seizure contemplates a forcible dispossession of the owner"). While this Court has not had occasion to address the issue directly, its analysis of search and seizure cases reflects the view that the securing of premises does not constitute a Fourth Amendment "seizure" of each of the individual items contained therein. For example, the Court has given detailed consideration to the question of when the police may *seize* evidence found in plain view in the course of executing a search warrant for other evidence, even though the entire area being searched is under the custody and control of the police during the search, and thus presumably, under petitioners' theory, *all* of the contents have already been seized. See, *e.g.*, *Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983); *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). Similarly, the Court has characterized the taking of individual items from an automobile as a seizure, even though the occupants had already been arrested and the entire automobile presumably was already within the custody and control of the police. See *Texas* v. *Brown*, *supra*, slip op. 8 (plurality opinion); *Colorado* v. *Bannister*, 449 U.S. 1, 3-4 (1980).

Moreover, acceptance of petitioners' theory would cast doubt on the validity of well-established law enforcement practices that are commonly recognized as constitutional. For example, when executing a search warrant, police officers routinely secure the premises in the sense that they do not allow individuals to walk off with the contents of the premises before the search is completed. Cf. *Michigan* v. *Summers*, 452 U.S. 692 (1981). Similarly, it is often necessary for police to cordon off an area during an investigation, for example, to apprehend a fugitive or to investigate a bomb threat. These procedures result in the immobilization of items contained in the secured premises, most of which obviously are not evidence

tioners' contention that there was an illegal *seizure* here rests on the fact that the officers divested them of control and custody of their possessions by securing the premises and forbidding removal of any of the contents of the apartment. This action, however, did not violate the Fourth Amendment. To the contrary, the officers' decision to secure the premises accords with this Court's prescription for dealing with the situation where the police have probable cause to believe that evidence or contraband is present in a private area, namely, preserving the status quo pending the issuance of a search warrant.

It is not disputed that the police officers had probable cause to believe that contraband would be found in petitioners' apartment at the time they first entered. Quite apart from the results of their extended surveillance of petitioners, the officers had been informed by Rivudalla that petitioners that afternoon had supplied him with half a kilogram of cocaine. Rivudalla also had indicated to the agents that Segura probably possessed more cocaine in his apartment, reporting that he had not bought all the cocaine that Segura offered for sale (J.A. 9-10). Indeed, both courts below upheld the validity of the search warrant based on the information known to the officers before they entered the apartment (J.A. 13, 24), thus recognizing the existence of probable cause at that point.

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of a crime, but it cannot be maintained that these procedures expose the officers to liability for "seizing" those items without probable cause. Indeed, the implication of petitioners' contention is that the specificity requirement of the Fourth Amendment can never be satisfied by a warrant authorizing a seizure of specific items expected to be found in a particular area (see *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 4), because the police necessarily will also "seize" many innocuous items not covered by the warrant in the course of executing the search. By the same token, it is difficult to say here that the officers "seized" the evidence within the meaning of the Fourth Amendment simply because they secured the apartment, when they had not yet even discovered the evidence.

Given the existence of probable cause, we submit that the police were entitled to secure the premises to preserve the status quo, although, of course, they were not entitled to secure it by making an entry unless exigent circumstances existed.

Petitioners correctly state (Br. 23) that the Fourth Amendment protects against both unreasonable searches and unreasonable seizures. They seriously err, however, in asserting (Br. 23) that there is no distinction between searches and seizures with regard to what precautions satisfy the reasonableness standard and, based on that premise, in arguing that the officers unlawfully secured their premises in the absence of a warrant. In fact, there is a sharp distinction between searches and seizures with respect to the necessity for the prophylactic measure of a warrant. Because seizures involve only an interference with an individual's possessory interest, and hence are less intrusive than privacy-invading searches, seizures on the basis of probable cause are generally permitted without a warrant. See, *e.g.*, *Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983), slip op. 8 (plurality opinion) ("[O]ur decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately."). See also *id.* at 2-3 (Stevens, J., concurring); *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 5; *Payton* v. *New York*, 445 U.S. 573, 587 (1980); *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 354 (1977). Indeed, even the more intrusive seizure of a *person* (*i.e.*, an arrest), may be effected in a public place without a warrant. *United States* v. *Santana*, 427 U.S. 38, 41-42 (1976); *United States* v. *Watson*, 423 U.S. 411 (1976).[10]

[10] It is true that, in the absence of exigent circumstances, a warrant is necessary to effect an arrest in a home or an entry onto private premises to effect a seizure of property, but that is because of the invasion of privacy involved in the entry into the home (*i.e.*, the search), not because of the intrusiveness of the arrest or seizure itself. See *Payton* v. *New York*, *supra*, 445 U.S. at 587-590; *G.M. Leasing Corp.* v. *United States*, *supra*, 429 U.S. at 354.

It follows from these principles regarding extended or permanent seizures that police may seize property that they have probable cause to believe contains contraband for the limited period necessary to obtain a search warrant. In *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), the Court held that a warrant was necessary to *search* on the basis of probable cause a suitcase found in an automobile, but it made clear that there was no such prerequisite to *seizure* of the suitcase; rather, the Court explained that the police acted "commendably" (*id.* at 761) in seizing the suitcase and that the proper course of action for police faced with such a situation would be to seize the suitcase and take it to a magistrate to await the issuance of a warrant. *Id.* at 764 n.13. See also *United States* v. *Place*, *supra*, slip op. 5 n.3; *United States* v. *Chadwick*, *supra*, 433 U.S. at 13 & n.8; *Chambers* v. *Maroney*, 399 U.S. 42, 51-52 (1970). Such a seizure of a container is merely a common application of a more general rule that the police may take reasonable measures to prevent the destruction of evidence and preserve the status quo pending issuance of a search warrant. See, *e.g.*, *Cupp* v. *Murphy*, 412 U.S. 291, 298 (1973) (Marshall, J., concurring) (approving a warrantless search of an arrestee because "there was no way to preserve the status quo while a warrant was sought").[11]

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[11] Indeed, the possible destruction of evidence is such a significant concern that in some situations it may justify a warrantless *search*. For example, the limited search incident to arrest is permitted because of, *inter alia*, the danger of destruction of evidence, even when the police have no particular reason to suspect that the arrestee is concealing any evidence. *Chimel* v. *California*, 395 U.S. 752, 763 (1969). And, of course, if the police have sufficient reason to believe that evidence is in danger of destruction before a search warrant can be secured, exigent circumstances permit a warrantless entry even into a dwelling. See *United States* v. *Santana*, 427 U.S. 38, 43 (1976); *Vale* v. *Louisiana*, 399 U.S. 30, 35 (1970); *Johnson* v. *United States*, 333 U.S. 10, 15 (1948); *United States* v. *Rubin*, 474 F.2d 262 (3d Cir. 1973).

When, as here, police officers have probable cause to believe that contraband is contained in a dwelling, the same principles apply. As long as they do not invade a privacy interest, the police are entitled to preserve the status quo while they obtain a warrant by securing the premises, and thus arguably "seizing" the dwelling and its contents to prevent the destruction of evidence. Although the Court has never been faced with a specific challenge to an action securing the premises, the Court's opinions reflect the understanding that such a "seizure" is reasonable under the Fourth Amendment. In *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980), police lawfully entered a house armed with an arrest warrant. After unsuccessfully searching for the individual named in the warrant, several police officers detained the occupants of the house while fellow officers obtained a search warrant. This Court considered and ultimately rejected the contention that statements made by the detainees should be suppressed as the fruits of an illegal detention. *Id.* at 106-110.[12] Significantly, however, the Court never doubted the admissibility of the evidence discovered when the warrant was executed, apparently assuming that the officers were entitled to remain in the house to prevent the destruction of evidence while the warrant was being obtained. Similarly, in *Mincey* v. *Arizona*, 437 U.S. 385, 394 (1978), the Court held unconstitutional a warrantless search of an apartment where a homicide had been committed, but it noted approvingly the use of a police guard to prevent the destruction of evidence, suggesting that this precaution should have been taken while the officers obtained a search warrant. See also *United States* v. *Jeffers*, 342 U.S. 48, 52 (1951); *United States* v. *Ross*, 655 F.2d 1159, 1196 (D.C. Cir. 1981) (Wilkey, J., dissenting), rev'd, 456 U.S. 798 (1982); *United States* v. *Hayes*, 518 F.2d 675, 678 (6th Cir. 1975); 2 W. LaFave, *Search and Seizure* § 6.5, at 451 (1978).

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[12] Under *Michigan* v. *Summers*, *supra*, it would appear that this detention did not violate the Fourth Amendment.

In sum, given the officers' probable cause to believe that there was contraband in petitioners' apartment, it was reasonable under the Fourth Amendment for the officers to take steps to prevent destruction of that evidence by securing the premises. That does not mean that the officers were entitled to enter the apartment and infringe petitioners' privacy interest in their dwelling in the absence of exigent circumstances or some other justification for entering, but it does mean that they were permitted to station themselves in a place where they had a right to be and prevent persons from entering the apartment to destroy evidence until the warrant was issued. To the extent such action is deemed a Fourth Amendment "seizure," it is not unlawful.[13]

In this case, of course, the officers did not simply secure the premises from the *outside*; after Segura's arrest, they entered the apartment and thereafter remained *inside* to secure the premises. This entry, which intruded onto petitioners' privacy interest and thus was a "search," poses a distinct question (discussed in Part B, *infra*) as to whether the entry should result in suppression. But it is important to note that, contrary to petitioners' suggestion (Br. 9, 11, 22-24), the fact that the officers remained inside the apartment after this entry rather than going back outside to secure the premises is irrelevant to whether there was an illegal *seizure*. Petitioners' argument that there was an illegal seizure rests on the officers' "control" of the apartment in the sense that they would not permit removal of its contents until the warrant was issued; this control would have been exercised

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[13] We reiterate that in this case the officers plainly had probable cause to believe that there were narcotics stored in petitioners' apartment, and they were in the process of obtaining a search warrant based on facts already known to them when they secured the premises. Thus, we do not contend that police officers lacking probable cause to search are permitted to secure premises for more than a brief time by limiting entry while they seek additional evidence that would justify issuance of a search warrant. Cf. *United States* v. *Allard*, *supra*, 634 F.2d at 1187.

to the same extent whether the officers remained in the apartment or guarded it from the outside. In other words, while there is a sense in which it could be said that items concealed in a house are constructively "seized" by official action preventing access to the premises, the degree of this seizure is the same whether the premises are secured from outside or from within.

The one federal court whose decisions lend support to petitioners' seizure theory, the Ninth Circuit, has explicitly recognized this fact. In *United States* v. *Lomas*, 706 F.2d 886 (1983), police officers entered a hotel room, stayed inside for 30 seconds to determine that no one was there, and then locked the door when they exited so that no one could enter without the assistance of the hotel management. Relying on its earlier decision in *United States* v. *Allard*, 634 F.2d 1182 (9th Cir. 1980), the court of appeals held that this entry was not justified by exigent circumstances and therefore that evidence later discovered in the hotel room pursuant to a warrant search was subject to suppression as the product of an earlier illegal seizure. The court explained that *Allard* was directed at all "police attempts to maintain the status quo by exercising control over a place while seeking a search warrant." 706 F.2d at 894. Hence, the court stated, "[t]hough the officers here exercised control over a hotel room by locking the door rather than waiting inside and decided to seek a warrant before they entered the room rather than afterward, these differences are not legally significant." *Ibid.*; footnote omitted. As explained above, we strenuously disagree with the *Lomas* court (see *id.* at 894 n.3) and with petitioner that the police are not permitted to take steps to preserve the status quo pending the issuance of a warrant; indeed, the absurd result in *Lomas* highlights the inadequacy of petitioners' position.[14]

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[14] Petitioners contend (Br. 40-44) that the police officers here were not entitled to make use of the "impoundment alternative." It is not clear whether petitioners are focusing on the entry into the apartment or whether they are arguing that the police needed

Accordingly, we maintain that no illegal seizure occurred in this case, and we turn to the question whether the search entailed in the *entry* into the apartment requires suppression of the evidence in question.

B. The Evidence Seized Under The Warrant Is Not Suppressible As The Fruit Of An Illegal Entry

The court of appeals held that exigent circumstances did not justify the officers' warrantless entry into petitioners' apartment because they lacked sufficient reason to fear that evidence would be destroyed before the warrant issued. Therefore, the entry and ensuing security search violated the Fourth Amendment. Because the discovery of the evidence in question here was not a product of this illegality, however, but rather was derived from the independent source of an untainted warrant, we submit that the court of appeals correctly held that the evidence was not a "fruit" of the illegality and hence should not be suppressed.

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a warrant to secure the premises from the *outside*—a contention that we regard as manifestly erroneous. The phrase "impoundment alternative" is apparently taken from the writings of two commentators. See 2 W. LaFave, *supra*, § 6.5(c), at 450; Note, *Police Practices and the Threatened Destruction of Tangible Evidence*, 84 Harv. L. Rev. 1465, 1474-1489 (1971). Each of these commentators approves the use of the "impoundment alternative" in limited circumstances. See 2 W. LaFave, *supra*, § 6.5(c), at 454-455; 84 Harv. L. Rev. at 1480-1481. It must be emphasized, however, that these commentators focus on an impoundment effected by *entering* the house and do not suggest that there necessarily should be restrictions on the power of police to secure premises from the *outside* on the basis of probable cause. See 2 W. LaFave, *supra*, § 6.5(c), at 451-452; 84 Harv. L. Rev. at 1478. Indeed, although *Lomas* creates some uncertainty on this point, even the Ninth Circuit has recognized that securing premises from the outside to preserve the status quo pending issuance of a warrant is ordinarily reasonable under the Fourth Amendment. See *United States* v. *Flickinger*, 573 F.2d 1349, 1355-1356, cert. denied, 439 U.S. 836 (1978); *United States* v. *Sherwin*, 572 F.2d 196, 200 (1977).

1. *A Fourth Amendment Violation Requires Suppression of Evidence Only When an Exploitation of the Illegality Causes the Discovery of the Evidence*

From the inception of the exclusionary rule this Court has recognized that not all evidence discovered after the commission of a Fourth Amendment violation is subject to suppression. The sanction of the exclusionary rule, which has the harsh consequence of excluding probative evidence from trial, is imposed only against the "fruit of the poisonous tree"; evidence untainted by the illegality is not a suppressible fruit. As Justice Holmes explained in *Silverthorne Lumber Co.* v. *United States*, *supra*, 251 U.S. at 392:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.

See also *United States* v. *Wade*, 388 U.S. 218, 242 (1976); *Nardone* v. *United States*, *supra*, 308 U.S. at 341.

In *Wong Sun*, the Court reiterated that "the exclusionary rule has no application [where] the Government learned of the evidence 'from an independent source.'" 371 U.S. at 487, quoting *Silverthorne Lumber Co.* v. *United States*, *supra*. The Court went on to explain that even evidence derived in some way from a Fourth Amendment violation should not be suppressed unless it was sufficiently tainted by the illegality to be considered "fruit of the poisonous tree." It stated (371 U.S. at 487-488; citation omitted):

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have

> come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

See also *Brown* v. *Illinois*, *supra*, 422 U.S. at 599.

It is often difficult to determine whether the discovery of evidence that is traceable to a Fourth Amendment violation is sufficiently attenuated to permit its introduction at trial under *Wong Sun*. But the Court's statements in *Silverthorne Lumber Co.* and *Wong Sun* make clear that the attenuation question arises at all only if the illegality is the "but-for" cause of the discovery of the evidence. The indispensable first step to finding that evidence should be suppressed is a determination that "the challenged evidence is in some sense the product of illegal governmental activity." *United States* v. *Crews*, *supra*, 445 U.S. at 471. Thus, in *Crews*, a witness identified the defendant as her assailant based on a photograph taken of him during a concededly illegal detention. That illegality, however, was not a basis for suppressing the witness's in-court identification. That identification was founded on the witness's mental picture of her assailant formed at the time of the crime, and thus it was not a product of the illegal detention.

2. *The Illegal Entry Did Not Cause the Discovery of the Evidence in This Case*

As explained in Part A, *supra*, there was nothing illegal about the officers' acting to secure petitioners' apartment from the outside. What was illegal in the absence of exigent circumstances was the search entailed in the entry and security check of the apartment, which exposed portions of the private interior of the apartment to the view of the officers. The evidence in question here, however, did not derive from this illegal search. As in *Crews*,

"the Fourth Amendment violation * * * yielded nothing of evidentiary value that the police did not already have in their grasp" (445 U.S. at 475 (plurality opinion) (footnote omitted)), *i.e.*, the entry was not a "but-for" cause of the discovery of the evidence.

It is undisputed that the police officers did not discover any of the cocaine, cash, or narcotics records at issue here in the course of their entry and security check of petitioners' apartment, nor did they see anything else that contributed to their subsequent discovery of these items.[15] These items were discovered only when the officers searched the apartment pursuant to a valid warrant based on probable cause; indeed, the officers did not even know for certain of the existence of the evidence in question until it was found during the warrant search. Plainly, this evidence was a product of the lawful warrant search, not the prior unlawful entry and security search.

The warrant search itself, of course, was untainted because, as both courts below recognized (J.A. 13, 24), the underlying affidavit (J.A. 28-29) established probable cause based on the information known to the officers before the illegality occurred. Thus, the source for the warrant and the subsequent discovery of the evidence antedated, and was completely independent of, the illegal entry; therefore the warrant search itself cannot be characterized as a "fruit." See *United States* v. *Crews*, *supra*, 445 U.S. at 471-472.

In sum, the illegal entry was simply irrelevant in the traditional, causal sense to the discovery and seizure of the evidence in question. If the officers had not entered the apartment and conducted a security check, their subsequent actions that resulted in the discovery of the evidence would have been identical. They still would

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[15] As noted above (note 7, *supra*), the agents did discover a scale, lactose, and some cellophane bags when they conducted the security check, but the admissibility of those items into evidence is not in issue in this Court.

have obtained a search warrant, searched petitioners' apartment in the same manner, and discovered the same evidence that they did in the course of the warrant search actually conducted here. Nothing seen during the illegal entry contributed to the discovery of the evidence, and thus finding the initial entry to be an illegal search provides no basis for suppressing that evidence. See *People* v. *Arnau*, 58 N.Y.2d 27, 444 N.E.2d 13, 17, 457 N.Y.S.2d 763, 767 (1982).

3. *The Possibility that the Evidence Would Have Been Destroyed Before the Warrant Issued is Not a Valid Basis for Suppression*

There is one sense in which it can be argued that the evidence in question might not have been discovered but for the illegal entry: if the officers had not entered, but rather secured the premises from the outside, petitioner Colon might have been able to destroy the evidence before the warrant was issued and hence prevent its discovery pursuant to the lawful search. Petitioners do not appear to advance this contention, but the theory was the basis for the district court's conclusion that the evidence should be suppressed. See J.A. 15; see also *United States* v. *Allard*, *supra*, 634 F.2d at 1187. For several reasons, however, the possibility that the entry prevented the destruction of evidence should not be held to convert evidence discovered pursuant to a valid warrant search into a suppressible fruit of an antecedent illegal entry.

The court of appeals correctly rejected the district court's theory as "prudentially unsound" (J.A. 25). The warrant requirement of the Fourth Amendment is not designed to protect an individual's ability to destroy evidence or contraband in the time required to procure a warrant, thereby preventing its discovery. In the words of Judge Traynor, "[s]uspects have no constitutional right to destroy or dispose of evidence," and denying them the ability to do so provides no basis for suppression. *People* v. *Maddox*, 46 Cal.2d 301, 306, 294 P.2d 6,

9, cert. denied, 352 U.S. 858 (1956). Indeed, under 18 U.S.C. 2232, it is a criminal offense for any person "to prevent the seizure or securing" of goods by destroying or removing them before they are lawfully seized by the authorities. See also 18 U.S.C. 1510 (obstruction of justice). Surely, the costly remedy of the exclusionary rule should not be invoked in order to safeguard the ability of individuals to escape responsibility for one crime by destroying evidence of it, committing in the process a second criminal offense.

Moreover, as the court of appeals pointed out (J.A. 25-26), suppression on this basis is self-contradictory. An illegal entry can be the but-for cause of the discovery of evidence in this sense *only* if there were persons present in the apartment who would have removed or destroyed the evidence before a warrant was obtained.[16] But in that case exigent circumstances would in fact exist that would justify an entry into the apartment to prevent the destruction of evidence. Put another way, either (1) the evidence would have been destroyed before the warrant issued if the officers had not entered the apartment, in which case immediate entry was in fact necessary, or (2) the evidence would not have been destroyed before the warrant issued even if the officers had not entered the apartment, in which case the entry in no way was a but-for cause of the discovery of the evidence. Under either assumption, there is no sound

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[16] Thus, it is clear that when police officers illegally enter an apartment and find it *unoccupied*, the entry is not, even under the district court's theory, a but-for cause of the discovery of evidence pursuant to a valid warrant. If no one is in the dwelling, the evidence could not have been destroyed before the warrant search because the officers lawfully could have prevented other persons from entering the premises to destroy evidence. Therefore, the district court's theory does not explain cases such as *United States* v. *Lomas*, *supra*, and *United States* v. *Crozier*, 674 F.2d 1293 (9th Cir. 1982), petition for cert. pending, No. 82-819, where evidence seized pursuant to an untainted warrant search was suppressed because of a prior warrantless entry into unoccupied premises.

justification for suppressing the evidence discovered pursuant to the warrant search as the fruit of an illegal entry.

The district court plainly was guilty of this precise self-contradiction. It first found a Fourth Amendment violation here by concluding that exigent circumstances did not justify the entry because the officers "had no proof that anyone was in the apartment" (J.A. 14). The court then turned around and, without reference to this prior conclusion, held that the evidence was a fruit because petitioner "Colon might well have destroyed the evidence had she not been illegally excluded" from the apartment (J.A. 15).[17] We acknowledge that these two statements are not inevitably inconsistent because, as the court of appeals stated (J.A. 25-26), the officers' entry did not necessarily comport with the Fourth Amendment just because it later turned out that the apartment was occupied. The validity of the officers' determination that exigent circumstances existed turns on an objective appraisal of the facts known to them when they entered the apartment; it should not be vindicated on the basis of hindsight. But, by the same token, the fact that the officers were *correct* in believing that the apartment was occupied, and hence that there were in fact exigent circumstances, cannot be ignored in considering whether the exclusionary rule should apply.

Surely there is a logical problem in recognizing that warrantless entry is generally permitted to prevent the destruction of evidence, yet holding that in a particular case evidence must be suppressed because its destruction

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[17] The officers did have probable cause to arrest Colon, and thus it is odd to say that she was "illegally excluded" from the apartment. The district court apparently was referring to the fact that she was arrested in her apartment without a warrant (see *Payton* v. *New York*, *supra*), although the constitutional infirmity in such an arrest is the invasion of privacy associated with the warrantless entry (or *search*), not the arrest itself, which is justified by probable cause. See page 18, *supra*.

was prevented by an entry that is held illegal only because there was an insufficient basis to suspect that evidence might be destroyed. The anomalousness of the district court's approach is compounded by the fact that, if the apartment is unoccupied when the officers enter, the entry cannot even arguably be said to have aided the discovery of the evidence by preventing its destruction, in which event it is entirely impossible to contend that the evidence is a fruit. See note 16, *supra*. Thus, as the court of appeals noted (J.A. 26), the district court's fruits theory has the bizarre consequence of penalizing the officers for being right. The evidence is suppressed when the officers were correct in their belief that the apartment is occupied and hence the entry was in fact necessary, yet the evidence is admitted when the officers were incorrect in their belief and the apartment was unoccupied. This results in suppression in the very cases, and only those cases, where there were in fact exigent circumstances; if the officers' entry was unjustified, the evidence would be admitted, but if the officers' entry actually prevented individuals from successfully destroying evidence, the district court would have the exclusionary rule applied to suppress the evidence and thereby effectively complete the criminal's thwarted effort.

Even if suppression on this basis were not so self-contradictory, the evidence in question here cannot be characterized as a "fruit" under established attenuation principles. The possibility that the evidence would have been destroyed if the officers had not entered to secure the premises establishes, at most, a tenuous "but-for" connection between the discovery of the evidence and the illegality.[18] It is well established, however, that but-

[18] Indeed, the court of appeals rejected the district court's theory in part because it rests on "wholly speculative assumptions" concerning whether Colon would have destroyed the evidence were it not for the illegal entry—*i.e.*, the court doubted whether there was any "but-for" connection at all. We do not rely on this possibility that the evidence would not have been destroyed as being

for causation is only the starting point of the inquiry whether evidence is a suppressible fruit. The exclusionary rule requires suppression only when the evidence has been discovered by " 'exploitation of the illegality' "; suppression is not appropriate when the connection between the illegality and the evidence is sufficiently attenuated that its discovery is " 'by means sufficiently distinguishable to be purged of the primary taint.' " *Wong Sun* v. *United States*, *supra*, 371 U.S. at 488 (citation omitted). See also *Rawlings* v. *Kentucky*, *supra*, 448 U.S. at 106; *United States* v. *Ceccolini*, 435 U.S. 268, 274-275 (1978).

Under the attenuation test set forth in *Wong Sun*, this is the clearest case imaginable for finding that particular evidence is not a fruit. Even accepting the assumptions that establish such a causal connection (see note 18, *supra*), the connection between the illegality and the discovery of the evidence is indirect and quite attenuated—the possibility that the evidence would have been destroyed but for the illegality. The evidence was actually discovered pursuant to an untainted warrant search, which is plainly a "means sufficiently distinguish-

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fatal to petitioners' claim because, in our view, it *was* quite likely that Colon would have attempted to destroy the evidence before the warrant was obtained and that that likelihood established exigent circumstances that justified the warrantless entry. See pages 38-40, *infra*. We note, however, that the district court's suppression of *all* of the evidence does rest on a dubious speculation. Assuming that Colon did attempt to destroy the evidence inside the apartment before the warrant issued, it is unlikely that she could have completed the task of destroying the large quantity of evidence that existed without creating telltale noises or odors that would have alerted the officers stationed outside and provided them with a justification for entering the apartment to prevent further destruction of the evidence. See J.A. 25. Thus, even if the agents had not entered petitioners' apartment when they did, it is likely that some of the evidence would have remained and been discovered during the warrant search, and therefore it is doubtful that the discovery of every item of evidence can be said to be causally connected to the illegality.

able to be purged of the primary taint" (*Wong Sun* v. *United States*, *supra*, 371 U.S. at 488). By the same token, there is little basis for finding that the evidence was discovered by "exploitation of [the] illegality." *Ibid.* After the entry and limited security check, the officers conducted no search for evidence until a warrant was obtained. The decision to await a search warrant despite their premature and unexpected entry, which they believed to be necessitated by exigent circumstances, is antithetical to the concept of "exploiting" an illegal entry. Compare *Brown* v. *Illinois*, *supra*.

Accordingly, apart from the Ninth Circuit (see *United States* v. *Lomas*, *supra*; *United States* v. *Allard*, *supra*), the courts of appeals generally have held that evidence discovered in the course of an untainted warrant search is admissible despite a prior entry to secure the premises that was not justified by exigent circumstances. See *United States* v. *Perez*, 700 F.2d 1232, 1237-1238 (8th Cir. 1983); *United States* v. *Beck*, 662 F.2d 527, 530 (8th Cir. 1981); *United States* v. *Kinney*, 638 F.2d 941, 945 (6th Cir.), cert. denied, 452 U.S. 918 (1981); *United States* v. *Fitzharris*, 633 F.2d 416, 421 (5th Cir. 1980), cert. denied, 451 U.S. 988 (1981); *United States* v. *Korman*, 614 F.2d 541, 547 (6th Cir.), cert. denied, 446 U.S. 952 (1980); *United States* v. *Edwards*, 602 F.2d 458, 469 n.12 (1st Cir. 1979) (dictum); see also *United States* v. *Bosby*, 675 F.2d 1174, 1180-1181 (11th Cir. 1982) (illegal search of briefcase not ground for suppressing documents found in subsequent warrant search of briefcase by another officer); *People* v. *Arnau*, *supra* (N.Y. Ct. App.) (expressly rejecting *Allard*); *People* v. *Barndt*, 199 Colo. 51, 604 P.2d 1173, 1175-1176 (1980); *State* v. *Fenin*, 154 N.J. Super. 282, 287, 381 A.2d 364, 367 (1977).

In short, the discovery of the evidence pursuant to the untainted warrant search here was not a fruit of the illegal entry; rather, it is a classic example of evidence obtained through a source independent of the illegality

that is therefore not subject to suppression. In the words of Judge Sobeloff: "It is one thing to say that officers shall gain no advantage from violating the individual's rights; it is quite another to declare that such a violation shall put him beyond the law's reach even if his guilt can be proved by evidence that has been obtained lawfully." *Sutton* v. *United States*, 267 F.2d 271, 272 (4th Cir. 1959).

C. The Conduct Of The Police Here Provides No Basis For Applying The Exclusionary Rule To Suppress Evidence That Is Not The Fruit Of An Illegality

Petitioners contend that the officers here were guilty of "flagrant" (Br. 40, 42) and "disgraceful police misconduct" (*id.* at 35-36) and demonstrated a "disgraceful and purposeful disregard * * * of the Fourth Amendment" (*id.* at 37). Petitioners appear to argue that general considerations of deterrence justify suppression of the evidence here even if it is not subject to suppression under traditional exclusionary rule principles. This contention is both theoretically and factually unsound.

a. First, there is no theoretical basis for the contention that the flagrancy of police misconduct in a particular case warrants suppression of evidence not suppressible under ordinary Fourth Amendment principles because not traceable to the misconduct. See generally *United States* v. *Payner*, 447 U.S. 727 (1980). Because of the harsh consequences of applying the exclusionary rule,[19] this Court has restricted its application to those

[19] This Court has adverted many times to the costs of the exclusionary rule. There is a compelling "public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman* v. *United States*, 394 U.S. 165, 175 (1969). The application of the exclusionary rule in a given case undermines this interest and may allow "[t]he criminal * * * to go free because the constable has blundered." *People* v. *Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587, cert. denied, 270 U.S. 657 (1926). Moreover, this consequence can give rise to a public perception of unfairness that can have the "effect of generating disrespect for the law and administration of justice." *Stone* v. *Powell*, *supra*, 428 U.S. at

situations where its purposes—principally the deterrence of police misconduct—are best served. *United States* v. *Calandra*, *supra*, 414 U.S. at 348. The Court has determined that the policies of the exclusionary rule do not warrant suppression when the discovery of the challenged evidence has an independent untainted source or when the connection between the evidence and the illegality has been sufficiently attenuated under the *Wong Sun* test. These principles reflect a general determination that in such situations the incremental deterrent benefits that would flow from suppression do not outweigh the substantial societal costs of suppression. See, *e.g.*, *United States* v. *Ceccolini*, *supra*, 435 U.S. at 275-276. Even where the police misconduct can be termed "flagrant," it is appropriate to adhere to that general determination. This does not reflect a condonation of the police conduct. It simply represents a limitation of the application of the exclusionary rule, in accordance with its underlying policies, to situations where it is an appropriate remedy; the mere fact that an illegality has occurred does not provide a sufficient basis to suppress evidence unconnected to that violation. See *United States* v. *Payner*, *supra*, 447 U.S. at 733-736; see also *United States* v. *Morrison*, 449 U.S. 361, 365-366 (1981) (Sixth Amendment) ("[t]he remedy in the criminal proceeding is limited to denying the prosecution the fruits of its transgression").

This is not to say that the flagrancy of police conduct is completely irrelevant in considering the proper application of the exclusionary rule. To the contrary, it is undoubtedly a relevant consideration in certain contexts. For example, in the "fruits" area itself, the flagrancy of the police conduct is recognized as a material factor in the attenuation inquiry, provided there is a causal connection between the illegality and the evi-

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490-491 (footnote omitted). See generally *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), slip op. 12-13 (White, J., concurring in the judgment).

dence. See *Rawlings* v. *Kentucky*, *supra*, 448 U.S. at 109-110; *Brown* v. *Illinois*, *supra*, 422 U.S. at 604.[20] "Flagrancy" is only part of the inquiry, however; it is not alone a basis for suppression. Where, as here, the illegality and the discovery of the evidence are unrelated, established Fourth Amendment principles reject the imposition of the suppression remedy, even if the police action can be characterized as "flagrant."

b. Petitioners also appear to suggest (Br. 40-41) that, regardless of the flagrancy of the officers' conduct in this particular case, suppression is necessary as a general rule in circumstances such as these in order to deter police from entering premises unlawfully in every case in which they are seeking a search warrant. That is, petitioners suggest that unless an illegal warrantless entry is punished in every case by suppression of all after-acquired evidence—even if the discovery of the evidence is not causally connected to the illegality—police officers will be encouraged to commit flagrantly illegal entries while awaiting a warrant on the theory that they have nothing to lose. This concern is unfounded.

First, the assertion that adherence to the independent source doctrine in this context will materially encourage substantial Fourth Amendment violations ignores the practicalities of the situations in which the issue arises. The officers, having decided that probable cause exists and that a warrant should be produced, ordinarily have every reason to expect that their investigation will not be hampered by awaiting the magistrate's action on the warrant application. Accordingly, if they possess little

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[20] Similarly, if the Court were to adopt the so-called "good faith" exception to the exclusionary rule (see *Illinois* v. *Gates*, *supra* (White, J., concurring); *United States* v. *Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981))—a question now pending before it (see *United States* v. *Leon*, cert. granted, No. 82-1771 (June 27, 1983)—the flagrancy or "bad faith" of the officers' conduct would be a critical factor in considering the application of the exclusionary rule in a particular case.

or no reason to fear the destruction of evidence or the escape of suspects while awaiting the warrant, they have little incentive to make a pre-warrant entry. Such a course of action would serve only to expose them to the risk of civil liability without materially furthering their law enforcement goals. It is only when they entertain substantial fears that prompt action to secure the premises is necessary that they are likely to "jump the gun." But while they may sometimes be mistaken in such instances in their conclusion that the circumstances are sufficiently exigent to justify a warrantless entry, their improper action will in the nature of things generally occur only when the premature entry results from a marginal miscalculation rather than a gross or flagrant violation.

Moreover, admission of untainted evidence subsequently seized pursuant to a valid search warrant does not eliminate every deterrent to an illegal entry. Even if the court of appeals' decision is affirmed, there remain substantial disincentives to purposeful police entries in the absence of exigent circumstances. The illegal entry itself automatically results in a search, and it can reasonably be argued that items seen in plain view when the officers enter are fruits of the entry. Thus, in this case, several items of evidence were ordered suppressed by the court of appeals because they were first discovered during the initial entry and security check. See J.A. 26-27.[21] In

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[21] Because no cross-petition was filed in this case, the correctness of this aspect of the court of appeals' holding is not before this Court. We note, however, that the holding is open to question. Even if the sighting of the evidence in plain view during the warrantless entry makes the evidence a fruit of that entry, it is also true that the warrant search provides a concurrent "independent source" for its discovery. Moreover, under the "inevitable discovery" doctrine, evidence that is the fruit of an illegality may nevertheless be admitted at trial if it is shown that the evidence would inevitably have been discovered anyway even if the illegality had not occurred. See *Brewer* v. *Williams*, 430 U.S. 387, 406-407 n.12 (1977) (dictum). The courts of appeals have universally

addition, there may be probative evidence suppressed as a fruit in connection with the apprehension of persons inside the premises, such as the revolver and cash seized here from petitioner Colon's purse (see J.A. 13) or statements made by an arrestee. See, *e.g.*, *Taylor* v. *Alabama*, No. 81-5152 (June 23, 1982). See also *Gilbert* v. *California*, 388 U.S. 263, 273-274 (1967) (lineup identification). Moreover, at the time the warrantless entry to secure the premises is made, the police officers do not know for certain that a warrant will actually issue, and thus they are not in a substantially different position from officers in any situation where a warrantless entry is contemplated. See *United States* v. *Apker*, 705 F.2d 293, 307 (8th Cir. 1983). Yet it has never been thought necessary to reject the established "fruits" analysis in order to deter all warrantless entries. Finally, a deliberate violation of the Fourth Amendment exposes the officers to possible civil liability. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

This is not to say that suppression would have *no* incremental deterrent effect on illegal entries, only that, as in other areas of Fourth Amendment law, the limited deterrent benefit is outweighed by the substantial cost of suppression. In short, there is no special reason for excepting this case from the general principle that the

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adopted the inevitable discovery doctrine (see, *e.g.*, *United States* v. *Apker*, 705 F.2d 293, 306-307 (8th Cir. 1983); *United States* v. *Fisher*, 700 F.2d 780, 784 (2d Cir. 1983); *United States* v. *Romero*, 692 F.2d 699, 704 (10th Cir. 1982), and cases cited therein), and its validity is now before this Court (*Williams* v. *Nix*, 700 F.2d 1164 (8th Cir. 1983), cert. granted, No. 82-1651 (May 31, 1983)). Unless the evidence would have been destroyed before the warrant was obtained, which is not a possibility when the premises are unoccupied, evidence seen during a warrantless security check would inevitably have been discovered anyway during the later execution of a search warrant and hence should be admissible under the inevitable discovery doctrine. See *United States* v. *Fitzharris*, *supra*, 633 F.2d at 421; contra, *United States* v. *Griffin*, *supra*.

exclusionary rule does not require suppression of evidence that is not the fruit of an illegality.

c. Even assuming arguendo that petitioners are correct in asserting that suppression of evidence not discovered as the result of an illegal entry might be appropriate if the police acted in bad faith (cf. *Williams* v. *Nix*, 700 F.2d 1164 (8th Cir. 1983), cert. granted, No. 82-1651 (May 31, 1983) (bad faith exception to inevitable discovery doctrine)), the underlying factual premise of their argument in this case is manifestly erroneous. The police officers here simply did not act in bad faith or engage in flagrant misconduct. Indeed, while we have not asked this Court to rule on the fact-bound question whether there were exigent circumstances, in our view it is an extremely close question whether the officers' actions violated the Fourth Amendment at all. At most, they were guilty of committing a good faith mistake in making the difficult on-the-spot determination whether the existing circumstances were sufficiently exigent to justify a warrantless entry to prevent the destruction of evidence.

The court below correctly recognized (see J.A. 21-23) that a warrantless entry and protective sweep to prevent the destruction of evidence is permitted if officers have sufficient reason to believe that someone is on the premises who is likely to destroy the evidence before a search warrant is obtained. See, *e.g.*, *United States* v. *Santana*, 427 U.S. 38, 43 (1976); *Johnson* v. *United States*, 333 U.S. 10, 15 (1948); *United States* v. *Martino*, 664 F.2d 860, 869-870 (2d Cir. 1981), cert. denied, No. 81-6755 (June 28, 1982); *United States* v. *Wiga*, 662 F.2d 1325, 1329-1333 (9th Cir. 1981), cert. denied, 456 U.S. 918 (1982). The court held that there were no exigent circumstances here, however, because the officers did not have sufficient reason to believe that the apartment was occupied or that the occupants were about to destroy evidence; but this holding is at least open to question under the facts of this case.

First, there is no doubt that the agents had probable cause to believe that there was evidence in the apartment, as is manifested by the issuance of the search warrant. See page 17, *supra*. Second, they had strong reason to believe that, if the apartment were occupied, the occupants would be alerted that something was wrong and would attempt to destroy the evidence before the warrant was obtained. Rivudalla had told the police that Segura was scheduled to call him that evening at 10:00 p.m. to find out whether he had been able to sell the cocaine (J.A. 18; H. Tr. 151). Rivudalla's failure to be present to receive the scheduled call because of his arrest might well have suggested to the occupants that he had been arrested or at least that something was amiss; by the same token, Segura's arrest and his resulting failure to return to his apartment that night would also have given the occupants of the apartment reason to consider destroying the evidence. See, *e.g.*, *United States* v. *Campbell*, 581 F.2d 22, 26 (2d Cir. 1978).

These facts alone did not establish exigent circumstances because the officers initially had insufficient reason to believe that the apartment was occupied. The officers did not hear any noise coming from the apartment, and, accordingly, they did not enter, but rather established surveillance from the outside. The situation changed, however, when Segura returned to the apartment building alone at 11:15 p.m. and was arrested. At that point, the agents realized that Colon, whom they had assumed was with Segura (see H. Tr. 394), was probably in the apartment (her residence) given the lateness of the hour. The realization that the apartment was probably occupied, coupled with the other information known to the officers, gave rise to a reasonable basis for suspecting that the evidence might be destroyed if entry was postponed until a warrant was obtained the next day.[22] While the court

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[22] Contrary to petitioners' contention (Br. 19-21), therefore, this case is quite different from *Vale* v. *Louisiana*, *supra*, where the Court held a warrantless entry and *evidentiary* search illegal

of appeals considered these factors and held that they did not establish a sufficient degree of suspicion that evidence might be destroyed to justify a warrantless entry, the exigent circumstances question is plainly a close question of law, and the officers' commission of a Fourth Amendment violation, if there was a violation at all, manifestly resulted from a good faith misjudgment in a difficult situation.

The other actions taken by the officers, both before and after the entry, buttress the conclusion that they acted in good faith at all times. First, after Rivudalla's arrest, they contacted the United States Attorney's office to attempt to obtain a search warrant rather than acting on their own initiative. See *United States* v. *Campbell*, *supra*, 581 F.2d at 27 & n.9. When the Assistant United States Attorney informed them that a warrant could not be obtained until the following day,[23] the officers carried out the attorney's instructions to secure the premises from the outside. Only when the situation changed did the officers enter the apartment on the basis of their belief that a substantial danger existed that evidence

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because it was not justified by any exigency. 399 U.S. at 35. That conclusion rested largely on the Court's finding that the search took place after the officers had "satisfied themselves that no one else was in the house." *Id.* at 34.

[23] It is not clear why a greater effort was not made to obtain a search warrant when the officers first sought one, and we do not condone the failure to do so. Given that no warrant was available that night, however, we contend that the police officers acted in good faith at all times and that their conduct, to the extent it violated the Fourth Amendment, cannot be characterized as flagrant misconduct. We note that, subsequent to the events in this case, the United States Attorney circulated an internal memorandum reemphasizing that search warrants should be sought when at all possible, regardless of the hour, in order to avoid the need for warrantless entries to secure premises. (A copy of this memorandum is being lodged with the Court and furnished to counsel.) Accordingly, there is no reason to expect that the failure to attempt to contact a magistrate because of the lateness of the hour will be repeated in future cases.

would be destroyed,[24] and they then took no action beyond that reasonably necessary to preserve the evidence. They limited the privacy intrusion to a security check for the presence of persons (which was proper conduct if there were in fact exigent circumstances) and did not make any evidentiary search until the warrant was issued. Compare *Vale* v. *Louisiana*, 399 U.S. 30 (1970) (warrantless *evidentiary* search).[25] In sum, the officers at no time sought to subvert the warrant process; all their actions were taken with the understanding that no evi-

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[24] Petitioners erroneously assert (Br. 44) that the officers flouted the instructions of both the Assistant United States Attorney and Agent Palumbo in effecting the entry. The officers in fact closely followed the attorney's advice. As petitioners note (*ibid.*), he advised the officers (through Agent Palumbo) to secure the premises from the outside, which they did for almost five hours. The Assistant United States Attorney also advised the officers that they were allowed to enter the premises without a warrant if exigent circumstances arose; specifically, the attorney told Agent Palumbo "if you have reason to believe that there was somebody inside that could dispose of whatever was inside * * * you should go into the premises * * * to secure the premises" (H. Tr. 445). In accordance with these instructions, Agent Palumbo directed several officers to enter the apartment to secure the premises after Segura was arrested (see H. Tr. 155-156).

[25] Petitioners also erroneously claim (Br. 45) that the occupants of the apartment were illegally arrested. It is clear that the officers had probable cause to arrest petitioner Colon. Her arrest was illegal in the sense that the officers should not have entered the apartment to arrest her in the absence of exigent circumstances (*Payton* v. *New York*, *supra*), but this is the same illegality that is the focus of this case. That Colon's arrest was illegal for this reason does not suggest any misconduct on the part of the police officers that is not already inherent in the entry to secure the premises. Petitioners also appear to suggest that the arrests of the other occupants were illegal for lack of probable cause. They point to no finding, however, that there was no probable cause for the arrests; indeed, such an assumption is substantially undermined by the fact that two of the other occupants were indicted. See note 2, *supra*.

dentiary search would be undertaken unless and until the warrant they were in the process of seeking was obtained, and their actions were aimed at facilitating that end.

Petitioners object (Br. 45) that the length of time between the entry and the issuance of the warrant—19 hours—evidences the police officers' bad faith. This is simply not so. While 19 hours might often be an unreasonable length of time to secure premises pending the issuance of a warrant, and this delay perhaps could have been shortened somewhat here, in the circumstances of this case the amount of time consumed before the warrant issued does not indicate any bad faith. Petitioners' objection essentially is that the warrant was not obtained until 6:00 p.m. the following day rather than first thing in the morning. But this delay was occasioned by the fact that the police officers and attorneys involved in the case focused their energies on expediting the initial appearance of petitioners and the other arrestees before a magistrate (see Fed. R. Crim. P. 5(a)) rather than on procuring a warrant as quickly as possible (H. Tr. 161, 449-450). It must be emphasized that petitioners, the two residents of the apartment, both had been arrested and were in custody. The fact that their apartment was secured against entry by them or others therefore did not really affect them, and the delay in getting the warrant did not inconvenience them.[26] Thus, while it would have been incumbent on the officers to procure a warrant as expeditiously as possible if the securing of the premises had the effect of restricting individuals' access to their home, in the circumstances here it was reasonable for the officers to place a higher priority on other duties,

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[26] Accordingly, the assertion (Br. 45) that the delay in obtaining the warrant "prevent[ed] the normal use of the dwelling for an absurdly extended period of time" is simply inaccurate.

such as a speedy judicial appearance, rather than obtaining a warrant as quickly as possible.[27]

Petitioners also object (Br. 47-48) that the affidavit for the search warrant did not include the observations made by the officers during the security check.[28] This objection is mystifying. The function of the magistrate

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[27] Petitioners contend (Br. 45-47) that it was flagrant misconduct for the officers to remain inside to secure the premises after the illegal entry. This objection is misconceived. Given that the officers had already invaded petitioners' privacy by conducting a security check of the apartment and that petitioners were in custody, it made no practical difference whatsoever (except to the officers' comfort) whether the officers proceeded to secure the premises by sitting in the apartment or standing outside the door. Petitioners' reliance (Br. 47) on a quote from Professor LaFave's treatise is misplaced because the " 'more intrusive step' " referred to there is the entry itself (and consequent search) not the act of remaining inside the premises once the entry has already taken place.

Petitioners also object that the officers were free "to rummage around" the premises before the warrant issued, suggesting (Br. 45) that the officers perjured themselves at the suppression hearing. The short answer to this contention is that the record unequivocally demonstrates that the officers did not conduct an evidentiary search except pursuant to the warrant (see H. Tr. 375-385), and the courts below plainly credited the officers' testimony in this regard. More fundamentally, however, petitioners' objection highlights the crucial defect in their position. There is no reason to doubt the officers' testimony that they did not conduct an evidentiary search before the warrant arrived because there would have been no advantage for them in doing so. They expected to receive shortly a warrant authorizing them to conduct such a search lawfully. In the same way that a hypothetical pre-warrant search would not have gained the officers access to any evidence that they could not gain with the warrant, the illegal entry also did not gain them any advantage with respect to the discovery of evidence. That is, the valid warrant was an untainted source for the discovery of the evidence completely independent of the illegal entry.

[28] The actual validity of the warrant is not before this Court because it limited the grant of certiorari to Question 1 presented by the petition (see J.A. 33). Petitioners apparently raise this point as evidence of the "flagrancy" of the officers' misconduct.

is not to assess whether the police correctly determined that exigent circumstances justified a warrantless entry to prevent the destruction of evidence. Rather, the magistrate's function is to make a probable cause determination, and thus he was not misled in any way by the alleged omission. There was no reason for the police to include possibly tainted information in the warrant application, thus creating a ground for challenging the validity of the warrant; rather, they acted prudently and properly in drafting the affidavit to specify the basis for probable cause on which they first determined to seek the search warrant—before the warrantless entry.

In sum, the illegality in this case, to the extent there was a Fourth Amendment violation at all, was the result of a good faith misjudgment by police officers with respect to a difficult legal determination. That illegality did not contribute to the discovery of the evidence in question, which was found during the execution of an untainted warrant search. Accordingly, well-established principles dictate that the policies underlying the exclusionary rule do not justify suppression of the evidence.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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NO. 82-5298

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ANDRES SEGURA and LUZ MARINA COLON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY AND SUPPLEMENTAL BRIEF OF PETITIONERS

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1. Respondent contends (Br. 14-23) that the officers' entry into petitioners' apartment to secure the premises was not an illegal seizure of all of its contents. In support of this argument, respondent distinguishes between "searches" and "seizures" with respect to the Constitutional requirement of a warrant, and goes so far as to state that seizures, which respondent terms "less intrusive", are generally permitted without a warrant. (Br. 18)

In so arguing, respondent mistakingly relies on *Texas v. Brown*, U.S. , 103 S.Ct. 1535 (1983). *Texas v. Brown, supra*, dealing with the "plain view" exception to the warrant requirement, holds that police officers may immediately seize a suspicious object, without a warrant, if they perceive it while lawfully engaged in an activity in a particular place. An object is in "plain view" if it can be seized without compromising any interest in the personal privacy of a citizen. *Id.* at 1546 (Stevens, J. concurring).

In the instant case, the objects of the seizure were *not* in plain view, but were within a dwelling that the officers unlawfully entered and occupied. The actions of the police violated both the petitioners' interest in retaining possession of property ("seizure") and their interest in maintaining personal privacy ("search"). Since a person has the highest possible expectation of privacy in his home, *Payton v. New York*, 445 U.S. 573 (1980), the illegal entry and nineteen hour occupation constituted an infringement not only of petitioners' right of possession in the dwelling and its contents, but also their right of personal privacy against the probing eyes of the police.

2. Respondent's contention that "police may seize property that they have probable cause to believe contains contraband for the limited period necessary to obtain a search warrant" (Br. 19-20) is inapplicable where the "property"

consists of a dwelling and its contents. The cases cited by respondent involve luggage seizures from automobiles, where, because of the inherent mobility of the vehicle, and the lessened expectation of privacy one has while driving or riding in an automobile, a narrowly defined exception has been made to the rule that the police must obtain a warrant before seizing property. *See, e.g., Chambers v. Maroney*, 399 U.S. 42 (1970).

The interest in the privacy of the contents of a suitcase or a footlocker is little compromised by its seizure by the police in a public place or on a public highway. But when the suitcase is inside a house that the police illegally enter and occupy, no decision by this Court has allowed the seizure of such property pending the obtaining of a search warrant. The privacy interests of petitioners have been violated by the initial entry, and the violation continues for every minute of the illegal occupation.

3. Respondent argues (Br. 21-23) that the degree of seizure of the articles in the dwelling would be the same whether the premises were secured from outside or from within, and that therefore the occupation of the dwelling by the police is irrelevant to the question of whether there was an illegal seizure. This argument ignores the difference between sound, legitimate police activity and the violation of petitioners' Constitutional rights.

Quite simply, the illegal entry and occupation of the dwelling constituted a seizure of the dwelling and the later-discovered contraband, while if instead the police had never entered petitioners' apartment, no unconstitutional seizure of either the dwelling or its contents would have occurred. Indeed, it is often the case in Fourth Amendment jurisprudence that had the governmental officials acted in a lawful manner, the end result would have been the same: the seizure

of contraband or other incriminating evidence. *See, e.g., Johnson v. United States*, 333 U.S. 10 (1948); *McDonald v. United States*, 335 U.S. 451 (1948); *Mincey v. Arizona*, 437 U.S. 385 (1978). The "ends" of all police investigations are the detection and arrest of criminals and the seizure of illegal or incriminating evidence. The "means" utilized by the police are regulated by the Constitution and are always subject to the scrutiny of the judicial system. The ends cannot be allowed by this Court to justify the means; if they are, the protections of the Fourth Amendment will become greatly diminished, and the Warrant Clause will cease to have any meaning at all.

4. Respondent's argument (Br. 23-33) that the evidence seized under the warrant is not suppressible as the fruit of an illegal entry is a viable contention only if this Court decides that the initial illegal entry into and nineteen hour occupation of petitioners' home did not constitute a "seizure" of its contents, including the contraband discovered during the execution of the search warrant. Petitioners contend (Br. of Pet. 22-34) that the contraband seized was primary rather than derivative evidence and that therefore the doctrines of "attenuation" and "independent source" are inapplicable.

A very recent decision by the Oregon Supreme Court considered the question of whether the unlawful seizure and securing of a dwelling required that marijuana discovered during the execution of a warrant obtained two-and-a-half hours after the initial entry should be suppressed. *State v. Hansen*, 295 Or.Rptr 78, 664 P.2d 1095 (Or. 1983). The court rejected the government's reliance on *Wong Sun v. United States*, 371 U.S. 417 (1963), finding that the instant case was concerned with the very evidence the police sought to obtain by "securing" the premises, *i.e.*, "primary evidence", in contrast to *Wong Sun*, where the United States Supreme

Court was concerned with the admissibility of "derivative" evidence.

After refusing to go so far as to hold that a seizure of a residence is a seizure of all its contents, the *Hansen* court sought to determine exactly *what* is seized when a residence is "secured" or "frozen". First, it was held that such items of contraband as were actually discovered by the entering officers or which were clearly visible to the officers should be deemed to be seized. Second, as to contraband not discovered or visible on the officers' initial entry, *Hansen* looked to the purpose of the unlawful conduct. The purpose of the entry and occupation was to arrest and convict the defendant for possession of the primary evidence, the marijuana, and the unlawful entry figured in the accomplishment of that purpose by ensuring that the contraband believed by the police to be present could not, and would not, be removed. "The 'securing' of the premises as effectively reduced the marijuana to the control of the trespassing police as if they had actually discovered and taken physical possession of it. We hold this to be a seizure under both the state and federal constitutions and thereby proscribed as being unreasonable for want of a warrant." *Hansen, supra* at 664 P.2d 1105-6.

Petitioners submit that the holding in *Hansen, supra,* was based on a proper and logical analysis of the law, and urge this Court to follow the reasoning of that case.

5. Respondent asserts that "the fact that their (petitioners') apartment was secured against the entry by them or others . . . did not really affect them, and the delay in getting the warrant did not inconvenience them." (Br. 42) Such an argument undercuts the importance of the Warrant Clause of the Fourth Amendment, which affects us all, and the significant role of a judicial warrant.

The Fourth Amendment has nothing to do with the "convenience" of an individual defendant. It is, like all of the Bill

of Rights, an enunciation of rules of conduct that the government must obey. Its violation affects not only criminals or those thought to be criminals, but the life and liberty of us all. *Spano v. New York*, 360 U.S. 315, 320-321 (1959).

Had a warrant been obtained by the police before their illegal entry and occupation of petitioners' dwelling, such a warrant would have provided the detached scrutiny of a neutral magistrate and would have described the proper bounds once the search had begun. Further, a warrant would have assured petitioners "of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *United States v. Chadwick*, 433 U.S. 1, 9 (1977).

For the foregoing reasons and the reasons stated in petitioners' opening brief, the judgments of the court of appeals should be reversed.

Respectfully submitted,

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No. 82-5298

in the Supreme Court of the United States

OCTOBER TERM, 1982

ANDRES SEGURA AND LUZ MARINA COLON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

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PETITION FOR CERTIORARI FILED AUGUST 27, 1982,
CERTIORARI GRANTED FEBRUARY 22, 1983.

QUESTION PRESENTED

The issue on which Certiorari was granted is "[w]hether the introduction into evidence of contraband seized after a 19-hour hiatus between the illegal entry into and seizure of Petitioner's dwelling and the obtaining of a search warrant violates the Constitutional requirement that a magistrate find probable cause and issue a warrant *before* the police violate the privacy of the home?" (emphasis in the original)

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OPINION AND JUDGMENTS BELOW

The opinion of the Second Circuit Court of Appeals is reported at *United States v. Segura*, 633 F.2d 411 (2nd Cir. 1981) and is reproduced at Joint Appendix, Pages 17-27. The opinion of the United States District Court for the Eastern District of New York (John R. Bartels, District Judge) is unreported and is reproduced at Joint Appendix Pages 3-16.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment IV Provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc., (hereinafter "NACDL") is a District of Columbia non-profit corporation founded in 1958. More than 2,000 lawyers drawn from every state are members. The NACDL membership is in daily contact with the criminal justice system as advocates, law professors or judges of our state and federal courts. The NACDL is affiliated with the American Bar Association and is

awarded full representation in the ABA House of Delegates. One of the NACDL's stated objectives is to promote the proper administration of justice through its concern with the protection of individual rights and the improvement of the criminal law and its practices and procedures.

SUMMARY OF ARGUMENT

Privacy in the home is a core interest protected by the Fourth Amendment and, as such, has received and continues to deserve rigorous protection by this Court. The seizure of the Petitioners' apartment was a seizure of its contents. It matters little whether the agents rummaged through the apartment or whether they just merely "secured" it, taking note of what they would later seize under the warrant. The invasion of privacy interests protected by the Fourth Amendment occurred at the point of impoundment, not upon the subsequent seizure under the warrant. The later issuance of the warrant by the magistrate cannot cure the prior unlawful seizure.

Suppression of evidence first seized without a warrant and later re-seized pursuant to one is required to vindicate the right of privacy and will enhance Fourth Amendment values. This case cannot turn on whether the unlawfully seized evidence was used to obtain the warrant. Only suppression of all the evidence seized will deter police entries of this nature.

FACTS

Amicus Curiae adopts the statement of facts set forth in Petitioners' Brief.

ARGUMENT

THE EVIDENCE SEIZED UNDER THE SEARCH WARRANT SHOULD BE SUPPRESSED

The Second Circuit Court of Appeals held the search warrant issued by the Magistrate in this case to be valid, *United States v. Segura*, 633 F.2d 411, 414 (2nd Cir. 1981). Amicus curiae does not challenge that conclusion. To the Second Circuit, the issuance of the warrant was sufficient to validate the search and seizure under the authority of it irrespective of the unreasonableness of the entry into the apartment in the first instance. (Id. at 416-417). To reach its result, the Second Circuit had to proceed on two assumptions: that the warrantless entry into and impoundment of the apartment was not a seizure of its contents and, that the warrant somehow sufficiently intervened into the agents' continuous unlawful possession of the contents of the apartment to purge the taint of the initial seizure. The District Court put the focal issue well: [t]he real problem in this case is the effect of the search warrant issued after the premises were illegally secured." (Joint Appendix at 13). The Second Circuit based its result exclusively on its earlier decision in *United States v. Agapito*, 620 F.2d 324 (2nd Cir. 1980) *cert. denied* 449 U.S. 834 (1980). *Agapito* was a case factually similar to this in which DEA agents unlawfully entered the defendants' hotel room after arresting them in the hotel lobby. After holding possession of the room for almost 24 hours, the agents obtained a warrant and, on authority of the warrant, opened a suitcase they had seized, but had not opened, on their initial unlawful entry. After finding an untainted residue of information in the warrant sufficient to meet the probable cause

standard, the Court, without further discussion, sustained the seizure of drugs found in the suitcase.

Agapito, as in this case, is notable for the lack of discussion of the issue of whether the execution of the lawful warrant was tainted by the agents' prior unlawful entry into an area in which the defendants had justifiable expectations of privacy. *United States v. Agapito*, *supra*, 620 F.2d at 333-338; *United States v. Segura*, *supra*, 663 F.2d at 414. Citation by the *Agapito* panel to Mr. Justice Powell's dissent in part in *United States v. Giordano*, 416 U.S. 505, 554-556, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974), and to the opinion in *Parts Mfg. Corp. v. Lynch*, 129 F.2d 841, 842-843 (2nd Cir. 1942), *cert. denied*, 317 U.S. 674 1942) and *United States v. Cognato*, 408 F. Supp. 1000, 1005 (D. Conn. 1976). Affd. 539 F.2d 703 (2nd Cir. 1976), *cert. den.*, 430 U.S. 956 (1977), makes it reasonably apparent that under the Second Circuit's rationale, if no tainted evidence is used to obtain the warrant, whatever transpired prior to its issuance is a constitutional irrelevancy. *United States v. Agapito*, *supra*, 620 F.2d at 638.

The Second Circuit's apparent reluctance to describe its result in the language of the attenuation cases strongly suggests that this case resembles but does not tightly fit that mold. This clearly is not a case where illegally gathered primary evidence leads to and taints other evidence. *See*, *United States v. Crews*, 445 U.S. 463, 470-471, 100 S.Ct. 1244, 1249, 1250, 63 L.Ed.2d 537 (1980). 3 LaFave, *Search and Seizure*, Ch. 11.4 at P. 612 (1978). The officers apparently had probable cause to obtain a warrant, did not get one, and then impounded Petitioner's apartment and held it for some 19 hours

before obtaining the warrant and seizing evidence under the authority of it. By treating the question raised in this case as a "use" problem the Second Circuit has misdirected the inquiry. Proper analysis requires resolution of whether the Petitioners' protected Fourth Amendment interests were invaded by the agents and if so, whether preservation of Fourth Amendment values calls for suppression of all the evidence seized. The analytical model employed by the Second Circuit to decide this case is insufficient because it ignores consideration of these two factors which are the heart of the suppression cases.

> " . . . considerations relating to the exclusionary rule and the constitutional principles must play a factor in attenuation analysis. . . . The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purpose which the law is to serve." *United States v. Ceccolini*, 435, U.S. 268, 279, 98 S.Ct. 1054, 1061-1062, 55 L.Ed.2d 268 (1978).

It is the relationship between the unlawful impoundment and the seizure under the warrant that must occupy center stage. By drawing a distinct line between suppression and admission at the use and exploitation of the evidence illegally seized on the first search and the valid warrant as the predicate for the second, the Second Circuit created a *per se* rule under which the later search and seizure under authority of the warrant will always be lawful. *See, United States v. Agapito, supra*, 620 F.2d at 338.

This Court has on several occasions rejected the logic that the later adherence to one constitutional right will, of its own force, cure an earlier deprivation of another. In *Brown v. Illinois*, 422 U.S. 590, 601-603, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), this Court refused to accept the argument that giving *Miranda* warnings will alone s[illegible]ciently sanitize a confession made during a period of detention resulting from an unlawful arrest. Instead, the Court viewed the admissibility of the Mirandized confession "in light of the distinct policies and interests of the Fourth Amendment", 422 U.S. at 602:

> "If Miranda warnings, by themselves were held to attenuate the taint of an unlawful arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially deleted. . . . Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a 'cure-all' and the constitutional guarantee against unlawful search and seizures could be said to be reduced to 'a form of words'. *Brown v. Illinois, supra*, 422 U.S. 602-603.

In *Dunaway v. New York*, 442 U.S. 200, 217-219, 99 S.Ct. 2248, 60 L.Ed.2d 824, (1979) and *Taylor v. Alabama*, ___ U.S. ___, 102 S.Ct. 2664, 2669, ___ L.Ed.2d ___, (1982), the Court followed *Brown* and held that the question of suppression must be viewed in light of the interests the Fourth Amendment is designed serve and the deterrent purposes of the exclusionary rule. Viewed from this perspective, the Second Circuit simply pulled up too short. Notwithstanding the intervention

of the warrant, application of established Fourth Amendment principles compels the conclusion that the evidence taken by the DEA agents under authority of the warrant should be suppressed.

A. The Privacy Interest Asserted in this Case Is Exceptionally Strong

A long unbroken line of this Court's decisions hold simply and directly that the Fourth Amendment requires a warrant to be secured prior to the entry and search of an individual's home unless certain well-defined and narrow exigent circumstances are found to be present. *Steagald v. United States*, 451 U.S. 204, 101 S.Ct. 1642, 1647, 68 L.Ed.2d 38 (1981); *Payton v. New York*, 445 U.S. 573, 583-590, 100 S.Ct., 1371, 63 L.Ed.2d 639 (1980); *Mincey v. Arizona*, 437 U.S. 385, 391-395, 98 S.Ct. 2408, 57 L.Ed.2d, 290 (1978); *United States v. United States District Court*, 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972); *Coolidge v. New Hampshire*, 403 U.S. 443, 481, 91 S.Ct. 2022, 2045, 20 L.Ed.2d 564 (1971); *Vale v. Louisiana*, 399 U.S. 30, 33-34, 90 S.Ct. 1969, 26 L.Ed.2d 209 (1970); *McDonald v. United States*, 335 U.S. 451, 455-456, 69 S.Ct. 191, 93 L.Ed. 153 (1948); *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948); *Boyd v. United States*, 116 U.S. 616, 625 6 S.Ct. 524, 529, 29 L.Ed. 746 (1886). Lasson, *The History and Development of The Fourth Amendment to the Constitution of the United States*, 4th Ed. (1970) at 120. "Physical entry into the home," in this Court's words, "is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court, supra*, 407 U.S. at 313.

> "In terms that apply equally to seizures of property and to seizures of person, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. *Payton v. New York, supra,* 445 U.S. 590.

B. The Evidence Was Seized at the Time the Apartment Was Impounded, Not at the Time the Warrant Was Executed

Granting probable cause for the issuance of the warrant and assuming regularity in all other respects, the narrow question is whether the seizure took place under it or under the prior unlawful entry by the DEA agents. It is clear that seizure, not use, is the operative Fourth Amendment factor. *Florida v. Royer,* ___ U.S. ___ 103 S.Ct. 1319, ___ L.Ed.2d ___ (1983). This Court has most recently stated: "if there is no detention – no seizure within the meaning of the Fourth Amendment – then no constitutional rights have been infringed." *Florida v. Royer, supra,* ___ U.S. ___, 103 S.Ct. at 1324.

The decisions define the word "seizure" functionally. Giving the literal import of the word its due, this Court held in *Florida v. Royer, supra,* n.9, ___ U.S. at ___, 103 S.Ct. at 1327, that Royer's property was seized when the police took possession of it without his consent. *See also, Hale v. Henkel,* 201 U.S. 43, 26 S.Ct. 370, 379, 50 L.Ed. 652 (1906): ["... a seizure (of papers) contemplates a forcible dispossession of the owner. ..."]; *Colorado v. Banister,* n.3, 449 U.S. 1, 4, 101 S.Ct. 42, 65

L.Ed.2d 1 (1980): [". . . the stopping of a vehicle and the detention of its occupants constitute a seizure. . . ."]; *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980): [person "seized" when "reasonable person would have believed that he was not free to leave."]; *United States v. Shaefer, Michael & Clairton*, 637 F.2d 200, 202 (3rd Cir. 1980): [weigh bills "obtained" from truck driver by police and "photocopied and later returned" were seized]; *United States v. Thomas*, 613 F.2d 787, 793 (10th Cir. 1980); ["(a) 'seizure' is taking of property . . . [it] involves 'a forcible or secretive dispossession' "]; *United States v. Lisk*, 552 F.2d 228, 230 (7th Cir. 1975): [seizure is taking of property]; *United States v. Haden*, 397 F.2d 460, 465 (7th Cir. 1968): [seizure involves forcible or secretive dispossession].

Applying the functional definition of seizure to the facts of this case, it is evident that Petitioner's apartment, and everything in it, was seized if not on the agents' initial entry, then during their continued unreasonable nineteen-hour possession of it. After the agents entered the apartment, they separated Petitioners from their property and asserted full dominion and control over it. The agents continuously occupied the apartment for nineteen hours to "secure" it, i.e., to hold it against all others. It is hard to imagine under these circumstances that Petitioners could remove, use or even touch any item of property in the apartment. Indeed, when Petitioner Colon requested her handbag, the officers rifled through it and removed its contents.

Very recently, in *United States v. Ross*, ___ U.S. ___, 102 S.Ct. 2157, 2170 ___ L.Ed.2d ___ (1982), this Court noted in sustaining a search that:

> "A lawful search of a fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. . . .
>
> When a legitimate search is underway and where its purpose and its limits have been precisely defined, nice distinctions between closets, drawers and containers . . . must give way to the prompt and efficient completion of the task at hand."

Just as Petitioners are entitled to no such "nice distinctions" when the search is lawful, the police are similarly not entitled if the search is unlawful. The "container" unlawfully seized was Petitioners' home. Everything in it was simultaneously seized.

As the officers' possession of the apartment, and the items in it, was continuous, exclusive, forceful and adverse to the Petitioners' interest in those items, the apartment and its contents were clearly seized.

C. Suppression of All the Evidence Seized is Required

The next question is whether the search warrant broke the casual chain of illegality. As noted, the Second Circuit viewed the issuance of the warrant as the end-all of this case. Under the Second Circuit's rationale

the deterrence aspect of Fourth Amendment jurisprudence is lost. According to the Second Circuit, as long as anything taken in the illegal search was not used to obtain the warrant, the unlawful break-in is irrelevant.

The test for measuring "the point at which the detrimental consequences of illegal police action becomes so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost," *Brown v. Illinois, supra*, 422 U.S. at 607, (Powell, J., concurring in part), is that of *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963):

> "The . . . question in such a case is 'whether granting the establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation or instead by means sufficiently distinquishable to be purged of the primary taint'" *Id.*, at 487-488.

In *Brown v. Illinois, supra*, the Court articulated factors to which it would look to determine whether the illegality had been sufficiently severed to purge the "primary taint". In *Brown*, the defendant was held in custody as a result of an illegal arrest and while held gave inculpatory statements which were used against him at trial. The Supreme Court of Illinois held that the giving of *Miranda* warnings to defendant made the statements sufficiently voluntary to purge the taint of the arrest. This Court reversed, holding that the voluntariness of the statements was merely the beginning of the inquiry.

". . . *Miranda* warnings thus far have not been regarded as a means of remedying or detering violations of Fourth Amendments or rights. . . . The exclusionary rule, however, when utilized to effectuate the Fourth Amendment, serves interests and policies distinct from those it serves under the Fifth. *It is directed at all unlawful searches and seizures, not merely those which happen to produce incriminating or material testimony as fruits." Brown v. Illinois, supra,* 422 U.S. at 601, (emphasis added).

Whether taint may be removed, according to *Brown*, is measured by the "temporal proximity" between the constitutional violation and the evidence sought to be suppressed, "the presence of intervening circumstances" and, "particularly, the purpose and flagrancy of the official misconduct." *Brown v. Illinois, supra,* 422 U.S. 603-604.

1. *Temporary Proximity*

The impoundment of Petitioners' apartment for an unreasonably long period of time without any measurable attempt to obtain a warrant was not relevant to the Second Circuit.

Certainly, the length of a warrantless occupation bears on its reasonableness. *Florida v. Royer, supra,* ____ U.S. ____, 103 S.Ct. at 1328-1329. An intrusion of even short duration may constitute a seizure. *United States v. Brignoni-Ponce,* 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *Terry v. Ohio,* 392 U.S. 1, 16-19, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The District

Court rightly focused on the length of the warrantless occupation of Petitioners' apartment. The District Court held that the "18-20 hour delay in the issuance of the warrant, during which the agents remained in illegal possession of the premises, rendered the execution of the warrant unreasonable. . . ." (Joint Appendix at 15). Thus, even if the warrant's *issuance* is viewed apart from the unlawful entry and impoundment, the two became enmeshed, as the District Court correctly observed, at the point of *execution*. The taint of the illegal occupation of the apartment cannot dissipate when the very evidence re-seized under the warrant is present and available for that re-seizure through the initial unlawful warrantless seizure. Evidence unlawfully taken in the first instance cannot be "held" by police to be later re-seized under a warrant. *Florida v. Royer*, *supra*, ___ U.S. ___, 103 S.Ct. at 1327. Circular argument of this nature has repeatedly been rejected by this Court. *See, e.g., Johnson v. United States*, *supra*, 333 U.S. at 16-17: [". . . the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do."] The District Court's point seemed to have been missed by the Court of Appeals. It was the unlawful preservation of evidence for seizure that concerned the District Court when it stated that "[t]he evidence would not inevitably have been discovered . . . Colon might well have destroyed it." (Joint appendix at Page 15).

In sum, whatever might be said for a brief intrusion into the apartment or for a short detention of property cannot be said in this instance. The illegality of a warrantless impoundment of property magnifies geometrically with the passage of time because of the

requirement that the warrant precede, not follow, the entry and seizure. When property is unlawfully held by the authorities for an unreasonably long time, the ability to rummage uncontrolled through the owner's private personal effects and possessions also magnifies geometrically.

2. *Intervening Circumstances*

The warrant added nothing to what was already done. The agents were in possession of Petitioners' property to the exclusion of Petitioners' rights to do it. All the warrant could do was authorize a re-seizure of what was already in the agents possession. The warrant and magistrate serve their function before a search and seizure, not after it. *McDonald v. United States, supra*, 335 U.S. 445-456; *Johnson v. United Stated, supra*, 33 U.S. In this regard, it is well to cite here the observation of Mr. Justice Douglas in *McDonald v. United States, supra:*

> "The Fourth Amendment . . . marks the right of privacy as one of the unique values of our civilization. . . . The presence of a search warrant serves a high function . . . The right of privacy was deemend too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals." 335 U.S. at 453, 455-456.

3. *Purpose and Flagrancy*

Flagrancy lies at the core of this case. The entry into and the impoundment of Petitioners' apartment

was inexcusable. In doing it the DEA agents not only violated the Petitioners' rights, but also violated the express unambiguous instructions of their superior. It has been suggested that the more flagrant a violation of the Fourth Amendment, the more the need for suppression of evidence. *Brown v. Illinois, supra*, 422 U.S. at 604-605; 3 LaFave, *Search and Seizure*, Ch. 11.4 at p. 616. Here, there can be no question on this record that the break-in was an intentional, bad faith infringement of the Petitioners' rights. The agents apparently had probable cause to obtain a warrant throughout the entirety of this transaction and neither presented any rational excuse for not obtaining one nor came within any exception to the warrant requirement.

4. ***Suppression of the Evidence Seized under Authority of the Warrant Will Serve the Purpose of the Exclusionary Rule***

The purpose of the exclusionary rule has frequently been commented upon by this Court.

> "The Court in *Wong Sun*, as is customary, emphasized that application of the exclusionary rule on Toy's behalf protected Fourth Amendment guarantees in two respects: 'in terms of deterring lawless conduct by federal officers,' and by 'closing the doors of the federal courts to any use of evidence unconstitutional obtained.' Ibid. **These considerations of deterrence and of judicial integrity, by now, have become rather commonplace in the Court's cases. See, e.g., United States v. Peltier, 422 U.S. 531, 535-538, 95 S.Ct. 2313, 2316-2318, 45 L.Ed.2d 374; Untied States v. Calandra, 414**

U.S. 338, 347, 94 S.Ct. 613, 619, 38 L.Ed.2d 561 (1974); Terry v. Ohio, 392, U.S. 1, 12-13, 28-29, 88 S.Ct. 1868, 1875, 20 L.Ed.2d 889 (1968). 'The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' " Elkins v. United States, 364, U.S. 206, 217, 80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669 (1960). *Brown v. Illinois, supra*, 422 U.S. at 599-600.

Keeping the purpose of the rule in focus, the factors specific to this case strongly suggest its application. No mere innocent, unknowing or technical violation of the Fourth Amendment is involved. Centrally implicated is whether the police may unlawfully break into the homes of citizens. The right of privacy is a concept central to the American value system and has been institutionalized in this Court's decisions for almost one hundred years. The right of privacy has been described as "indispensable to the 'full enjoyment of personal security, personal liberty, and private property'; [it is] to be regarded as the very essence of constitutional liberty.' " *Gouled v. United States*, 255 U.S. 298, 302, 304, 41 S.Ct. 261, 65 L.Ed. 647 (1920). **To allow this very fundamental American idea to be eroded because the evidence derived from a police break-in is not used in some fashion against a defendant in a criminal case perceptibly depreciates a concept that historically has made our society measurably different and measurably better than others. It may be reasonably assumed that run of unlawful police entries into the home will be clandestine, professional affairs designed not to be**

discovered and not to turn up evidence to be used, but to confirm suspicions of criminality or even the existence of probable cause. Application of the doctrinal basis of the Second Circuit's decision in this case would allow confirmatory searches as long as nothing seen or taken is "used". Predicating enforcement of Fourth Amendment values on use, rather than upon a determination of whether a search or seizure occurred and whether a warrant was required, will vest the police with unbridled discretion to invade the most private sanctuaries of the innocent and the guilty alike.

CONCLUSION

Application of existing Fourth Amendment doctrine as articulated by this Court should result in suppression of all the evidence seized in this case. Suppression of the evidence seized is a result consonant with established principles of Fourth Amendment jurisprudence. A decision favoring the Government would severely undermine values lying at the core of the Fourth Amendment; would stand the warrant clause on its ear; and, would encourage unlawful secret confirmatory searches.

Respectfully submitted,

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No. 82-5298-CFY
Status: GRANTED

Title: Andres Segura and Luz Marina Colon, Petitioners
v.
United States

Docketed:
August 27, 1982

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Warburgh Jr.,Paul E.,
Fabricant,Peter J.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Aug 27 1982	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Sep 24 1982		Order extending time to file response to petition until October 29, 1982.
6	Oct 29 1982		Order extending time to file response to petition until November 24, 1982.
7	Nov 27 1982		Memorandum of respondent United States filed.
8	Dec 2 1982		DISTRIBUTED. January 7, 1983
9	Jan 26 1983		DISTRIBUTED. February 18, 1983
13	Feb 22 1983		The petition for a writ of certiorari is granted limited to Question 1 presented by the petition.
			**********
15	Mar 21 1983		Order extending time to file brief of petitioner on the merits until May 9, 1983.
16	Apr 1 1983		Joint appendix filed.
17	Apr 8 1983		Record filed.
18	Apr 8 1983		Certified original record & CA proceedings.
19	May 9 1983		Brief amicus curiae of Natl. Assn. of Criminal Defense Lawyers filed.
21	May 9 1983		Brief of petitioners Andres Segura, et al. filed.
23	Jun 9 1983		Order extending time to file brief of respondent on the merits until July 8, 1983.
25	Jul 15 1983		Order further extending time to file brief of respondent on the merits until July 29, 1983.
26	Jul 28 1983		Brief of respondent United States filed.
27	Aug 4 1983		CIRCULATED.
28	Sep 21 1983		SET FOR ARGUMENT. Wednesday, November 9, 1983. (1st case) (1 hour)
29	Oct 21 1983		Application for bail filed with TM (A-292).
30	Oct 24 1983		Application for bail denied by Marshall, J.
31	Nov 2 1983	X	Reply brief of petitioners Andres Segura, et al. filed.
33	Nov 9 1983		ARGUED.